TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 497

THE FIRST NATIONAL BANK OF CONCORD, NEW HAMPSHIRE, PLAINTIFF IN ERROR,

vs.

HOWARD HASTINGS, RECEIVER OF THE INDIANAPOLIS NATIONAL BANK OF INDIANAPOLIS

IN ERROR TO THE SUPREME JUDICIAL COURT OF NEW HAMPSHIRE

(16,704.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 187.

THE FIRST NATIONAL BANK OF CONCORD, NEW HAMPSHIRE, PLAINTIFF IN ERROR,

vs.

EDWARD HAWKINS, RECEIVER OF THE INDIANAPOLIS NATIONAL BANK OF INDIANAPOLIS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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a United States Circuit Court of Appeals for the First Circuit, October Term, 1896.

FIRST NATIONAL BANK OF CONCORD, Defendant, Plaintiff in Error,
v.
EDWARD HAWKINS, Receiver, Plaintiff, Defendant in Error. } No. 202.

Error to the circuit court of the United States for the district of New Hampshire.

Judgment in circuit court (Aldrich, J.) August 24, 1896.

Writ of Error to United States Circuit Court of Appeals for the First Circuit and Return of said United States Circuit Court of Appeals Thereon.

1 Writ of error to United States circuit court of appeals for the first circuit.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the first circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you or some of you, between The First National Bank of Concord, New Hampshire, plaintiff in error, and Edward Hawkins, receiver, defendant in error, a manifest error hath happened, to the great damage of the said First National Bank of Concord, New Hampshire, plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the twenty-first day of September, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
HORACE GRAY,
Associate Justice of the Supreme Court of the United States.

2 *Return of United States Circuit Court of Appeals for the First Circuit on Writ of Error.*

United States Circuit Court of Appeals for the First Circuit.

And now here the judges of the United States circuit court of appeals for the first circuit make return of this writ by annexing hereto and sending herewith a true copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said United States circuit court of appeals for the first circuit, hereto set my hand and affix the seal of said court, at Boston, in the first judicial circuit, this sixteenth day of October, A. D. 1897.

Seal United States Circuit Court of Appeals, First Circuit.

JOHN G. STETSON, *Clerk.*

3 *Transcript of Record and All Proceedings in United States Circuit Court of Appeals for the First Circuit.*

United States Circuit Court of Appeals for the First Circuit, October Term, 1896.

FIRST NATIONAL BANK OF CONCORD, Defendant, Plaintiff in Error,
v.
EDWARD HAWKINS, Receiver, Plaintiff, Defendant in Error. } No. 202.

Writ of Error to Circuit Court.

[L. S.] UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of New Hampshire, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said circuit court, before you, or some of you, between Edward Hawkins, receiver, plaintiff, and The First National Bank of Concord, defendant, a manifest error hath happened, to the great damage of the said First National Bank of Concord, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the first circuit, together with this writ, so that you have the same at the city of Boston, Massa-

chusetts, on the sixth day of October next, in the said circuit court of appeals, that, the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further
4 to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this sixteenth day of September, in the year of our Lord one thousand eight hundred and ninety-six.

FREMONT E. SHURTLEFF,
[L. S.] *Clerk of the Circuit Court of the United States,*
District of New Hampshire.

Allowed by—
EDGAR ALDRICH,
Presiding Judge.

Return of Circuit Court on Writ of Error.

CIRCUIT COURT OF THE UNITED STATES, *District of New Hampshire,* } ss:

And now here, the judges of the circuit court of the United States, in and for the district of New Hampshire, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States circuit court of appeals for the first circuit, as within commanded.

In testimony whereof, I, Fremont E. Shurtleff, clerk of said circuit court of the United States, in and for the district of New Hampshire, have hereto set my hand and the seal of said court this fifth day of October, A. D. 1896.

[SEAL.] FREMONT E. SHURTLEFF, *Clerk.*

A true copy of writ of error to circuit court and of return of circuit court thereon.

Attest: JOHN G. STETSON, *Clerk.*

5 *Transcript of Record of Circuit Court.*

(Filed in circuit court of appeals Oct. 6, 1896.)

UNITED STATES OF AMERICA, *District of New Hampshire,* } ss:

At a circuit court of the United States for the first circuit, begun and holden at Portsmouth within and for the district of Massachusetts, on the eighth day of May in the year of our Lord one thousand eight hundred and ninety-six.

Before the Honorable Edgar Aldrich, district judge, presiding.

EDWARD HAWKINS, Receiver,
v.
FIRST NATIONAL BANK OF CONCORD, NEW HAMPSHIRE. } No. 405, Law Docket.

Edward Hawkins, of Indianapolis, in the district of Indiana, as he is receiver of the Indianapolis National Bank of Indianapolis, a national banking association established and organized under and in pursuance of the laws of the United States of America, and located in Indianapolis, in said district of Indiana, who sues out this writ under the direction and by the authority of the Comptroller of the Currency, against the First National Bank of Concord, N. H., a national banking association established and existing under the laws of the United States of America and located in Concord, in said State of New Hampshire.

Declaration.

(Filed May 8, 1895.)

In a plea of debt for that, the said last-named association, on, to wit, July 24, A. D. 1893, failed, suspended, and became insolvent, and the total capital stock of said association, at the date of
6 such failure, was three hundred thousand dollars, and the defendant at the date of such failure, held and owned in its own right one hundred shares of said stock of the par value of ten thousand dollars; and, whereas on the third day of August, A. D. 1893, the plaintiff was by the Comptroller of the Currency duly and lawfully appointed receiver of said association, and as such receiver, duly appointed, qualified, acting and administering said trust, under the direction of the Comptroller of the Currency, and on the eighth day of said August, under and by virtue of said appointment, took possession of the assets of said association; and whereas on the twenty-fifth day of October, A. D. 1893, upon an accounting by said receiver and upon a valuation of uncollected assets remaining in the hands of said receiver, it appearing that in order to pay the debts of said association, it became necessary to enforce the individual liability of the stockholders, therefore, to the extent hereinafter mentioned, the Comptroller of the Currency did make an assessment and requisition upon the shareholders of said association for three hundred thousand dollars, to be paid by them ratably on or before the twenty-fifth day of November, A. D. 1893; and before the date and day last aforesaid, did make demand upon each and every one of said shareholders for one hundred dollars upon each and every share of the capital stock of said association, held or owned by them respectively, at the time of its failure, and did direct said receiver to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of such shareholders; of all which matter and things hereinbefore alleged, the defendant had then and there due notice and full knowledge, and by reason of the premises the defendant then and there became liable, and in con-

sideration thereof promised to pay to the plaintiff, in his capacity as receiver as aforesaid, on the said twenty-fifth day of November, A. D. 1893, the sum of ten thousand dollars, yet, although said day last mentioned has come and gone, the defendant has not paid the same.

Also in a plea of debt for that whereas said last-named association on the third day of August, A. D. 1893, failed, suspended and became insolvent, and was duly found and declared by the Comptroller of the Currency to be insolvent, the plaintiff was thereupon, on the said third day of August, A. D. 1893, duly and lawfully appointed
7 receiver thereof, by the Comptroller of the Currency, and duly qualified as such receiver, and his said appointment as said receiver is in full force and not revoked or annulled, and the defendant, at the date and time of such failure, held and owned and still holds and owns one hundred shares of the capital stock of said association of the par value of one hundred dollars per share; and said Comptroller of the Currency, on the twenty-fifth day of October, A. D. 1893, decided it was necessary to enforce the personal liability of said shareholders to the extent hereinafter mentioned, and did thereupon, on the day last above mentioned, make an assessment and requsition of one hundred dollars each share upon the stockholders and upon each and every share of said capital stock, held or owned by them respectively at the time aforesaid, to be paid to said receiver on or before the twenty-fifth day of November, A. D. 1893, and directed said receiver to enforce, by suit or otherwise, to that extent the personal liability of said shareholders, of all which matters and things hereinbefore alleged, the defendant then and there had due notice and full knowledge, and by reason of the premises the defendant then and there became liable, and in consideration thereof promised to pay to the plaintiff, the receiver as aforesaid, the sum of ten thousand dollars, on said twenty-fifth day of November, A. D. 1893. Yet, although said day has long since passed, defendant, although requested, has not paid the same, to the damage of the said plaintiff (as he says) the sum of fifteen thousand dollars, which shall then and there be made to appear, with other due damages.

This cause was entered at the May term of this court, A. D. 1895, when and where the parties appeared by their respective attorneys.

This cause was thence continued from term to term to the October term of this court, A. D. 1895, when on the eleventh day of October, A. D. 1895, the parties filed the following stipulation for waiving jury:

8 *Stipulation Waiving Jury.*

(Filed Oct. 11, 1895.)

It is agreed that trial by jury is waived in the above-entitled action, and that the same may be tried by the court, without jury,

in the same manner and reserving the same rights as if tried by jury.

J. S. H. FRINK, *For Plaintiff.*
STREETER, WALKER & HOLLIS,
For Defendant.

And on the 17th day of January, A. D. 1896, the court, the Honorable Edgar Aldrich, sitting, found the following facts:

Statement of Facts.

(Filed Jan. 17, 1896.)

The plaintiff is receiver of the Indianapolis National Bank of Indianapolis, which bank was duly organized and authorized to do business as a national banking association. The bank was declared insolvent and ceased to do business on the 24th day of July, 1893; the plaintiff was duly appointed and qualified receiver of the bank on the 3d day of August, 1893, and took possession of the assets of the bank on the 8th day of the same month. The capital stock of the bank was 3,000 shares of the par value of $100 each. On the 25th day of October, 1893, an assessment was ordered by the comptroller of $100 per share on the capital stock of the bank, to enforce the individual liability of shareholders, and an order made to pay such assessment on or before the 25th day of November, 1893, and the defendant was duly notified thereof.

The defendant, being a national banking association, duly organized and authorized to do business at Concord, N. H., on the 21st day of May, 1889, with a portion of its surplus funds, purchased of a third party, authorized to hold and make sale, 100 shares of the stock of the Indianapolis national bank, as an investment, and has ever since held the same as an investment. The defendant bank has appeared upon the books of the Indianapolis na-
9 tional bank as a shareholder of 100 shares of its stock, from the time of such purchase to the present time. During such holding the defendant bank received annual dividends declared by the Indianapolis bank prior to July, 1893. The defendant has not paid said assessment or any part thereof.

The parties of record, through their counsel of record, having appeared before me in this, a jury-waived case, and having adduced their evidence, I find the facts above stated.

EDGAR ALDRICH,
Presiding Judge.

January 17, 1896.

Record to be printed.

Argument upon question of law involved, February 17, 1896, 3 p. m.

EDGAR ALDRICH,
Presiding Judge.

This cause was thence continued to the present term, when to wit, on the twenty-eighth day of July, A. D. 1896, the following ruling is made:

Ruling.

(Filed July 28, 1896.)

ALDRICH, *J.:*

This case is submitted without argument. Upon the foregoing facts my impressions are with the plaintiff and my ruling therefore is that the plaintiff is entitled to recover.

To this ruling the defendant duly and seasonably excepted, stating the following grounds of exception.

First. The defendant, as a national banking association, has no power or authority to purchase with its surplus funds, as an investment, and hold as such, shares of stock in another national banking association. Such purchase and holding are *ultra vires* of the corporation.

Second. The defendant, as a national banking association, has no power or authority to incur any liability to pay the assessment sought to be recovered in this case.

Third. As a matter of law, the defendant is not liable upon the facts found, to pay the assessment sought to be recovered in this case.

10 On the sixth day of August, A. D. 1896, the defendant files the following bill of exceptions, the same being allowed by the court on the eleventh day of August, A. D. 1896:

Defendant's Bill of Exceptions.

(Filed Aug. 6, 1896, and allowed Aug. 11.)

This is an action of debt by the plaintiff, as receiver of the Indianapolis National Bank of Indianapolis, Ind., against the defendant, an alleged shareholder in said bank, to recover an assessment levied upon the shareholders of said Indianapolis national bank, under sect. 5151 of the Revised Statutes of the United States. The writ was entered at the May term, 1895, of said court.

Issue was duly joined, and on Oct. 11, 1895, the parties filed a written stipulation waiving trial by jury and agreeing that the case might be tried by the court, without jury, in the same manner and reserving the same rights as if tried by jury.

Afterwards, to wit, on Jan. 16, 1896, evidence on both sides having been considered, the court made findings of fact as appears in the following statement of facts, filed on said Jan. 17, 1896.

Statement of Facts.

(Filed Jan. 17, 1896.)

The plaintiff is receiver of the Indianapolis National Bank of Indianapolis, which bank was duly organized and authorized to do

business as a national banking association. The bank was declared insolvent and ceased to do business on the 24th day of July, 1893; the plaintiff was duly appointed and qualified receiver of the bank on the 3d day of August, 1893, and took possession of the assets *of the assets* of the bank on the 8th day of the same month. The capital stock of the bank was 3,000 shares of the par value of $100 each. On the 25th day of October, 1893, an assessment was ordered by the comptroller of $100 per share on the capital stock of the bank, to enforce the individual liability of shareholders, and an order made to pay such assessment on or before the 25th day of November, 1893, and the defendant was duly notified thereof.

The defendant, being a national banking association, duly organized and authorized to do business at Concord, N. H., on the 21st day of May, 1889, with a portion of its surplus funds, purchased of a third party, authorized to hold and make sale, 100 shares of the stock of the Indianapolis national bank as an investment,
11 and has ever since held the same as an investment. The defendant bank has appeared upon the books of the Indianapolis national bank as a shareholder of 100 shares of its stock, from the time of such purchase to the present time. During such holding the defendant bank received annual dividends declared by the Indianapolis bank prior to July, 1893. The defendant has not paid said assessment or any part thereof.

The parties of record, through their counsel of record, having appeared before me in this, a jury-waived case and having adduced their evidence, I find the facts above stated.

EDGAR ALDRICH,
Presiding Judge.

January 17, 1896.

The case being submitted without argument, the court made the following ruling:

"Upon the foregoing facts, my impressions are with the plaintiff, and my ruling therefore is that the plaintiff is entitled to recover."

To this ruling the defendant duly and seasonably excepted, stating the following grounds of exception:

First. The defendant, as a national banking association, has no power or authority to purchase with its surplus funds, as an investment, and hold as such, shares of stock in another national banking association. Such purchase and holding are *ultra vires* of the corporation.

Second. The defendant, as a national banking association, has no power or authority to incur any liability to pay the assessment sought to be recovered in this case.

Third. As a matter of law, the defendant is not liable upon the facts found, to pay the assessment sought to be recovered in this case.

THE FIRST NATIONAL BANK OF CONCORD,
By its attorneys, STREETER, WALKER & HOLLIS.

Aug. 11, 1896.

Allowed:

ALDRICH, *J.*

And on the twenty-fourth day of August, A. D. 1896, it is considered by the court, the Honorable Edgar Aldrich, district judge, sitting, that the plaintiff recover against the defendant the sum
12 of eleven thousand six hundred and forty-six dollars and sixty-seven cents ($11,646.67), damages, and costs taxed at seventy-two dollars and thirty cents ($72.30).

A true record.
Attest: FREMONT E. SHURTLEFF, *Clerk.*

Upon the rendering of this judgment the defendant petitions for a writ of error to the United States circuit court of appeals for the first circuit, and gives good and sufficient security that it will prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, and said writ of error is allowed.

Petition for Writ of Error to Circuit Court.

(Filed Sept. 16, 1896.)

To the honorable the judges of the circuit court of the United States within and for the district of New Hampshire:

The defendant, The First National Bank of Concord, in the action of Edward Hawkins, receiver, *v.* The First National Bank of Concord, representing and claiming that error in law appears of record therein, respectfully petition for a writ of error to the circuit court of appeals sitting in and for the first judicial circuit, and herewith file their assignment of errors.

THE FIRST NATIONAL BANK
OF CONCORD,
By its attorneys, STREETER, WALKER & HOLLIS.

A true copy.
Attest: FREMONT E. SHURTLEFF, *Clerk.*

Assignment of Errors in Circuit Court.

(Filed Sept. 16, 1896.)

Afterwards, to wit, on the sixth day of October in the year of our Lord one thousand eight hundred and ninety-six, at the October term for 1896 of the United States circuit court of appeals for the first circuit, at the city of Boston, in the Commonwealth of Massachusetts, comes the said First National Bank of Concord, by Frank S. Streeter, its attorney, and says that in the record and pro-
13 ceedings in the above-entitled matter, there is manifest error in this, to wit:—

First. The circuit court has erred in ruling that the plaintiff in this case is entitled to recover, as appears by the following statement:

" Evidence on both sides having been considered, the court made

findings of fact as appears in the following statement of facts, filed on said Jan. 17, 1896.

Statement of Facts.

(Filed Jan. 17, 1896.)

The plaintiff is receiver of the Indianapolis National Bank of Indianapolis, which bank was duly organized and authorized to do business as a national banking association. The bank was declared insolvent and ceased to do business on the twenty-fourth day of July, 1893; the plaintiff was duly appointed and qualified receiver of the bank on the third day of August, 1893, and took possession of the assets of the bank on the eighth day of the same month. The capital stock of the bank was 3,000 shares of the par value of $100 each. On the 25th day of October, 1893, an assessment was ordered by the comptroller of $100 per share on the capital stock of the bank, to enforce the individual liability of shareholders, and an order made to pay such assessment on or before the 25th day of November, 1893, and the defendant was duly notified thereof.

The defendant, being a national banking association, duly organized and authorized to do business at Concord, N. H., on the 21st day of May, 1889, with a portion of its surplus funds, purchased of a third party authorized to hold and make sale, 100 shares of the stock of the Indianapolis national bank, as an investment, and has ever since held the same as an investment. The defendant bank has appeared upon the books of the Indianapolis national bank as a shareholder of 100 shares of its stock, from the time of such purchase to the present time. During such holding the defendant bank received annual dividends declared by the Indianapolis bank prior to July, 1893. The defendant has not paid said assessment or any part thereof.

The parties of record, through their counsel of record, having appeared before me in this, a jury-waived case, and having adduced their evidence, I find the facts above stated.

EDGAR ALDRICH,
Presiding Judge.

January 17, 1896.

14 The case being submitted without argument, the court made the following ruling:

"Upon the foregoing facts, my impressions are that the plaintiff is entitled to recover.

To this ruling the defendant duly and seasonably excepted, stating the following grounds of exception:

First. The defendant, as a national banking association, has no power or authority to purchase with its surplus funds, as an investment, and hold as such, shares of stock in another national banking association. Such purchase and holding are *untra vires* of the corporation.

Second. The defendant, as a national banking association, has no power or authority to incur any liability to pay the assessment sought to be recovered in this case.

Third. As a matter of law, the defendant is not liable upon the facts found to pay the assessment sought to be recovered in this case."

Wherefore the said First National Bank of Concord prays that the ruling of said circuit court of the United States be revised, and that the judgment entered thereupon be reversed.

THE FIRST NATIONAL BANK
OF CONCORD,
By its attorney, FRANK S. STREETER.

A true copy.
Attest: FREMONT E. SHURTLEFF, *Clerk.*

Bond on Writ of Error to Circuit Court.

(Filed Sept. 16, 1896.)

Know all men by these presents, that we, The First National Bank of Concord, a national banking association duly authorized, and located at Concord, N. H, as principal, and Wm. F. Thayer and Wm. A. Stone, both of said Concord, as sureties, are held and firmly bound unto Edward Hawkins, receiver of the Indianapolis national bank, duly authorized and located at Indianapolis, Ind., in the full and just sum of two hundred and fifty dollars, to be paid to the said Edward Hawkins, receiver, or his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fifteenth day of September, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a circuit court of the United States for
15 the district of New Hampshire, in a suit depending in said court, between said Edward Hawkins, receiver, plaintiff, and said First National Bank of Concord, defendant, judgment was rendered against the said First National Bank of Concord and the said First National Bank of Concord having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Edward Hawkins, receiver, citing and admonishing him to be and appear in the United States circuit court of appeals for the first circuit, in the city of Boston, Mass., on the sixth day of October, A. D. 1896:

Now, the condition of the above obligation is such, that if the said First National Bank of Concord shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea

good, then the above obligation to be void; else to remain in full force and virtue.

FIRST NATIONAL BANK,
CONCORD, N. H., [SEAL.]
By WM. F. THAYER, *Pr.*
WM. F. THAYER. [SEAL.]
W. A. STONE, JR. [SEAL.]

Sealed and delivered in presence of—
FRANK E. SHEPARD.
E. F. PHILBRICK.

Approved:
EDGAR ALDRICH,
Presiding Judge.

A true copy.
Attest: FREMONT E. SHURTLEFF, *Clerk.*

Citation on Writ of Error to Circuit Court.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Edward Hawkins, of Indianapolis, in the district of Indiana, as you are receiver of the Indianapolis National Bank of Indianapolis, a national banking association established and organized under the laws of the United States, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the first circuit, in the city of Boston, Mass., on the sixth day of October, next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of New Hampshire, wherein The First National Bank of Concord, a national banking association established and organized under the laws of the United States and located at Concord, in the State of New Hampshire, is plaintiff
16 in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edgar Aldrich, judge of the circuit court of the United States for the district of New Hampshire, this sixteenth day of September, in the year of our Lord one thousand eight hundred and ninety-six.

EDGAR ALDRICH,
Presiding Judge.

PORTSMOUTH, N. H., *Sept.* 21, 1896.

Due and sufficient service of the within citation is hereby acknowledged.

J. S. H. FRINK,
Attorney for Defendant in Error.

Circuit Court Clerk's Certificate.

UNITED STATES OF AMERICA, *District of New Hampshire,* } ss:

I, Fremont E. Shurtleff, clerk of the circuit court of the United States for the district of New Hampshire, hereby certify that the foregoing is a true copy of the record and all proceedings in the cause entitled, Edward Hawkins, plaintiff, *v.* First National Bank of Concord, defendant, No. 405, law docket, in said circuit court determined, the petition for writ of error, the assignment of errors, and the bond to party on writ of error, and also the original citation upon the writ of error issued in said cause with acknowledgment of service thereon.

In testimony whereof, I hereto set my hand and affix the seal of said circuit court at Concord, this fifth day of October, in the year of our Lord one thousand eight hundred and ninety-six.

[SEAL.] FREMONT E. SHURTLEFF, *Clerk.*

A true copy of transcript of record of circuit court returned, with writ of error, to trial court.

Attest: JOHN G. STETSON, *Clerk.*

17 United States Circuit Court of Appeals for the First Circuit, October Term, 1896.

FIRST NATIONAL BANK OF CONCORD, Defendant, Plaintiff in Error,
v.
EDWARD HAWKINS, Receiver, Plaintiff, Defendant in Error. } No. 202.

Error to the circuit court for the district of New Hampshire.

Before Colt, Putnam, and Webb, JJ.

Opinion of the Court.

March 5, 1897.

PUTNAM, *J.:*

This case is based by the plaintiff in error on the proposition that it had no power under the law of its creation to acquire the stock of another national bank as an investment. It is not necessary for us to consider this proposition. It is settled that it had full power to loan on the stock as collateral, or to take it in settlement of a doubtful debt, and in either case, as incidental thereto, to cause the stock to be transferred into its own name absolutely if it deemed it for its interest so to do. First National Bank of Charlotte *v.* National Exchange Bank of Baltimore, 92 U. S., 122; National Bank *v.* Case, 99 U. S., 628. Therefore, on the face of the transaction, no illegality appeared, and nothing to advise, either the bank whose

stock it acquired, or the existing or future creditors of that
18 bank, or the Comptroller of the Currency, who was their quasi-public representative, that the transaction was not within the scope of the unquestionable powers of the plaintiff in error.

Under these circumstances the entire trend of the law is that the plaintiff in error is estopped to deny its liability in this case. Chubb *v.* Upton, 95 U. S., 665; Pullman *v.* Upton, 96 U. S., 328, 330; National Bank *v.* Case, 99 U. S., 628; Scovill *v.* Thayer, 105 U. S., 143, 149; Anderson *v.* Philadelphia Warehouse Company, 111 U. S., 479, 483; Whitney *v.* Butler, 118 U. S., 655, 660. There might arise some exceptional instances where, for special reasons, this estoppel would not apply; as where stock had been issued in excess of the authorized limit (Scovill *v.* Thayer, *ubi supra*), or where, in the cases represented by section 5152 of the Revised Statutes, there are no interests capable of binding themselves either by contract or estoppel, or where the substance of the transaction appears on its face, as in Beal *v.* Essex Savings Bank, decided by us and reported in 33 U. S. App., 101, and 67 Fed. Rep., 816; although the latter class is not strictly exceptional. But none of those special elements are found here. We have no need to reconcile Burgess *v.* Seligman, 107 U. S., 20, which arose on a statute of Missouri, as the decisions referred to by us apply directly to national banks, and come down to a later date.

The plaintiff in error maintains that the liability sought to be enforced here is merely contractual, flowing out of the acquisition of the stock in question and continuous upon it; so that, therefore, if the original investment was unauthorized, the liability, being still *in fieri*, cannot be enforced. But this does not correctly state the nature of the liability. There can be no substantial doubt that, whether the purchase of the stock was authorized or not, the plaintiff in error was, after its transfer, by the force of the transaction, its owner, and that no one else could stand as such. Under these circumstances, the liability sought to be enforced here arises
19 by force of the statute, and is not contractual. Keyser *v.* Hitz, 133 U. S., 138, 151.

Indeed the expressions of the Supreme Court found in National Bank *v.* Case, *ubi supra*, are so much in harmony with the rules deducible from the practical conclusions of that court in the cases to which we have referred, that we accept them as disposing of this suit. The court said, at page 633:

"There is nothing in the argument on behalf of the appellant that the bank was not authorized to make a loan with the stock of another bank pledged as collateral security. That is an ordinary mode of loaning, and there is nothing in the letter or spirit of the national banking act that prohibits it. But if there were, the lender could not set up its own violation of law to escape the responsibility resulting from its illegal action."

The judgment of the circuit court is affirmed, with interest, and with the costs of this court to the defendant in error.

A true copy.

Attest: JOHN G. STETSON, *Clerk.*

20 United States Circuit Court of Appeals for the First Circuit, October Term, 1896.

FIRST NATIONAL BANK OF CONCORD, Defendant, Plaintiff in Error,
v.
EDWARD HAWKINS, Receiver, Plaintiff, Defendant in Error. } No. 202.

Error to the circuit court for the district of New Hampshire.

Judgment.

March 5, 1897.

This cause came on to be heard February 24, 1897, on the transcript of record of the circuit court of the United States for the district of New Hampshire, and was argued by counsel.

On consideration whereof it is now, to wit, March 5, 1897, ordered and adjudged as follows: The judgment of the circuit court is affirmed, with interest, and with the costs of this court to the defendant in error.

By the court.

JOHN G. STETSON, *Clerk.*

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

21 United States Circuit Court of Appeals for the First Circuit, October Term, 1896.

FIRST NATIONAL BANK OF CONCORD, N. H., Defendant, Plaintiff in Error,
v.
EDWARD HAWKINS, Receiver, Plaintiff, Defendant in Error. } No. 176.

Petition of the First National Bank of Concord, N. H., for a Rehearing.

(Filed July 5, 1897.)

To the honorable the judges of the United States circuit court of appeals for the first circuit:

Your petitioner, The First National Bank of Concord, N. H., by its counsel respectfully represents as follows:

That it is the plaintiff in error in the above-entitled cause lately heard in this court, and that it verily believes that it has good and sufficient cause why said action should be reheard on certain points, and why judgment should be entered herein other than the one affirming the judgment of the circuit court; and that an order of judgment should be entered sustaining your petitioner's writ of error, reversing or vacating the judgment of the circuit court, and remanding the case to the circuit court, with directions to enter judgment for the defendant, plaintiff in error. And it respectfully shows the following as the grounds for this its petition:

1. By its said writ of error, your petition- contended that the defendant as a national banking association had no power or authority to purchase with its surplus funds as an investment, and hold
22 as such, shares of stock in another national banking association, and that such purchase and holding were *ultra vires* of the corporation; also that the defendant as a national banking association had no power or authority to incur any liability to pay the assessment sought to be recovered of it in this case; also that, as a matter of law, the defendant is not liable upon the facts found, to pay the assessment sought to be recovered in this case.

The petitioner further contended that it was not estopped to urge its want of authority to purchase said stock as an investment, to defeat the attempt to enforce against it the liability of a stockholder.

2. On behalf of your petitioner it is further shown that in the decision of this honorable court filed March 5, 1897, it was held to be unnecessary to consider whether the petitioner had power under the laws of its creation—the national banking act, so called—to acquire the stock of another national bank as an investment, because if it had not such power, it would be estopped to urge such want of power in denial of its liability in this case, and for this reason the judgment of the circuit court was affirmed by this court.

3. On behalf of your petitioner, it is further shown, that since the aforesaid decision of this court on, to wit, May 24, 1897, the questions involved herein have been finally determined by the Supreme Court of the United States in the case California National Bank *v.* Kennedy, published in the Supreme Court Reporter, vol. 17, No. 31, June 7, 1897, and the said determination of the Supreme Court is hereby referred to and made a part of this motion.

It is further shown, that under the aforesaid decision of the Supreme Court of the United States in California National Bank *v.* Kennedy, it is held (1) that the statutes of the United States relating to the organization and powers of national banks prohibit them from purchasing or subscribing to the stock of any other corporation; and (2) that the want of such power can be urged by any national bank to defeat an attempt to enforce against it the liability of a stockholder in such other corporation.

4. On behalf of the petitioner, it is further suggested, that because this honorable court, in its decision of March 5, 1897, did not have the aid of the determination of the Supreme Court of the United States rendered in California National Bank *v.* Kennedy, May 24, 1897, and because the determination of said Supreme Court seems to be conclusive upon the questions involved in the case at bar, justice requires that a rehearing be had upon said questions
23 before this court, to the end that this court may reconsider its said decision, and the legal and practical effect of the said determination of the Supreme Court upon the same.

It is further suggested that if, as it now appears, the said determination of the Supreme Court of the United States is conclusive upon the right of the plaintiff in error to have judgment in the case at bar, it would not be just or equitable that the plaintiff in error should be compelled to seek relief by suing out a writ or error to

the Supreme Court of the United States, but that this honorable court may properly reconsider said questions, and determine the same in accordance with legal principles established by said Supreme Court of the United States.

Wherefore, your petitioner respectfully prays that this cause may be ordered to be reheard or reargued as soon as may be, at a time to be fixed by this honorable court, on the questions whether the order or judgment of this court affirming the judgment of the circuit court should not be vacated and reversed so as to sustain your petitioner's writ of error, and reverse the judgment of the circuit court, and remand the case to the circuit court with directions to that effect, and to enter judgment for the petitioner with costs, or that such order may be made in the premises as may be just.

And your petitioner will ever pray.

THE FIRST NATIONAL BANK OF CONCORD,
Defendant, Plaintiff in Error, and Petitioner,
By its attorney FRANK S. STREETER.

JUNE 26, 1897.

I, Frank S. Streeter, do hereby certify that I am counsel for the above-named petitioner; that I have prepared the foregoing petition, and believe that the cause is proper to be reheard upon the points set forth in said petition; that the reasons therein given for a rehearing or reargument of this cause are, in my opinion, well founded in point of law; and, further, that the relief prayed for is proper and equitable to be granted in this cause.

FRANK S. STREETER,
Counsel for Defendant, Plaintiff in Error, and Petitioner.

June 26, 1897.

24 United States Circuit Court of Appeals for the First Circuit, October Term, 1896.

FIRST NATIONAL BANK OF CONCORD, Defendant, Plaintiff in Error,
v.
EDWARD HAWKINS, Receiver, Plaintiff, Defendant in Error. } No. 202.

Error to the circuit court for the district of New Hampshire.

Before Colt, Putnam, and Webb, JJ.

Opinion of the Court.

July 20, 1897.

PUTNAM, *J.*:

The plaintiff in error has filed a petition for a rehearing, resting on California Bank *v.* Kennedy, 167 U. S., 362, which was decided a few days after our decision in this case. The issue considered by

the Supreme Court was the liability of a national bank as a stockholder in a State savings bank, while the question before us was as to its liability as a stockholder in another national bank. The question discussed by the Supreme Court was more largely that of *ultra vires* than that of the policy of the statutes relating to national banking associations, and its line of decisions which we understood to bind us in the case at bar were not particularly noticed by it. Therefore, it does not follow beyond question that California Bank *v.* Kennedy is decisive of the case at bar.

Inasmuch as the defendant in error has undoubted means of relief by a writ of error, we, under the circumstances, are of the opinion that the petition should be denied.

Petition for rehearing denied; mandate to stay until further order.

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

25 United States Circuit Court of Appeals for the First Circuit, October Term, 1896.

FIRST NATIONAL BANK OF CONCORD, Defendant, Plaintiff in Error,
v.
EDWARD HAWKINS, Receiver, Plaintiff, Defendant in Error. } No. 202.

Order of Court.

September 18, 1897.

It is now, to wit, September 18, 1897, ordered by the court that a mandate issue in this cause when applied for.

By the court:.

JOHN G. STETSON, *Clerk.*

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

26 United States Circuit Court of Appeals for the First Circuit, October Term, 1896.

FIRST NATIONAL BANK OF CONCORD, Defendant, Plaintiff in Error,
v.
EDWARD HAWKINS, Receiver, Plaintiff, Defendant in Error. } No. 202.

Assignment of Errors.

(Filed September 18, 1897, with clerk of U. S. circuit court of appeals for the first circuit.)

Now comes the above-named plaintiff in error, The First National Bank of Concord, New Hampshire, by Frank S. Streeter, its attor-

ney, and says that in the records and proceedings in the above-entitled action in the United States circuit court of appeals for the first circuit there is manifest error in this, to wit:

First. The plaintiff in error assigns as error the several errors set out in the assignment of errors forming a part of the record in said action before the said circuit court of appeals, namely:

That the court erred in ruling that the plaintiff (defendant in error herein) is entitled to recover upon the facts found, in that:

1. The defendant (plaintiff in error herein), as a national banking association, has no power or authority to purchase with its surplus funds as an investment and hold as such shares of stock in another national banking association; such purchase and holding are *ultra vires* of the corporation.

27 2. The defendant (plaintiff in error herein), as a national banking association, has no power or authority to incur any liability to pay the assessment sought to be recovered in this case.

3. As a matter of law, the defendant (plaintiff in error herein) is not liable upon the facts found to pay the assessment sought to be recovered in this case.

Second. That said circuit court of appeals, before which was heard the writ of error which brought up the record in this action from the circuit court of the United States for the district of New Hampshire to said circuit court of appeals, erred in making its order on the fifth day of March, 1897, affirming the judgment of the said circuit court of the United States, with interest and with the costs of said circuit court of appeals to the defendant in error.

Third. That said circuit court of appeals erred in not sustaining the writ of error then before it and not reversing the judgment entered in this action in said circuit court.

And the said First National Bank of Concord, plaintiff in error, prays that the judgment aforesaid entered in this action in the circuit court for the district of New Hampshire and the order entered therein, as aforesaid, by the circuit court of appeals, to wit, the judgment of affirmance rendered on the fifth day of March, 1897, for the errors aforesaid and for other errors in the records and proceedings aforesaid, be reversed, annulled, and altogether held for naught, and that the plaintiff in error may be restored to all things which it has lost by reason of said judgment and order.

Dated September 18, 1897.

THE FIRST NATIONAL BANK OF CONCORD, N. H.,
By its attorney, FRANK S. STREETER.

A true copy.

Attest: JOHN G. STETSON, *Clerk.*

28 *Certificate of Clerk of United States Circuit Court of Appeals for the First Circuit.*

UNITED STATES OF AMERICA, *First Judicial Circuit,* } ss.:

I, John G. Stetson, clerk of the United States circuit court of appeals for the first circuit, certify that the foregoing pages, 3 to 27, inclusive, contain and are a true copy of the record and all proceedings in the cause entitled First National Bank of Concord, defendant, plaintiff in error, *v.* Edward Hawkins, receiver, plaintiff, defendant in error, No. 202, in said United States circuit court of appeals for the first circuit determined.

I further certify that annexed hereto is a true copy of a bond on writ of error to said United States circuit court of appeals in said cause, which bond is on file in the office of the clerk of said circuit court of appeals.

Seal United States Circuit Court of Appeals, First Circuit.

In testimony whereof I hereunto set my hand and affix the seal of said United States circuit court of appeals, at Boston, in the first judicial circuit, this sixteenth day of October, A. D. 1897.

JOHN G. STETSON, *Clerk.*

29 *Bond to Party on Writ of Error to United States Circuit Court of Appeals for the First Circuit.*

Know all men by these presents that we, The First National Bank of Concord, New Hampshire, a national banking association duly organized and doing business at said Concord, as principal, and William F. Thayer and William A. Stone, both of said Concord, as sureties, are held and firmly bound unto Edward Hawkins, receiver of the Indianapolis national bank, a national banking association duly organized and formerly doing business at Indianapolis, Indiana, in the full and just sum of fifteen thousand —, to be paid to the said Edward Hawkins, receiver, or — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twentieth day of September, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a United States circuit court of appeals for the first circuit, in a suit depending in said court between said First National Bank of Concord, New Hampshire, plaintiff in error, and said Edward Hawkins, receiver, defendant in error, a judgment was rendered against the said First National Bank of Concord, New Hampshire, plaintiff in error, and the said First National Bank of Concord, New Hampshire, plaintiff in error, having obtained a writ of error and filed a copy thereof in the clerk's office of the said

court to reverse the judgment in the aforesaid suit, and a citation directed to the said Edward Hawkins, receiver, defendant in error, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said First National Bank of Concord, New Hampshire, plaintiff in error, shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE FIRST NATIONAL BANK OF CONCORD, N. H.,
By W. F. THAYER, *Pres't.* [SEAL.]
W. F. THAYER. [SEAL.]
W. A. STONE, JR. [SEAL.]

Sealed and delivered in presence of—
EDITH M. BURLEIGH.
FRANK E. SHEPARD.

Approved September 21, 1897, by—
HORACE GRAY,
Associate Justice of the Supreme Court of the United States.

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

30 UNITED STATES OF AMERICA, *ss:*

To Edward Hawkins, of Indianapolis, in the district of Indiana, as you are receiver of the Indianapolis National Bank of Indianapolis, a national banking association established and organized under the laws of the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the first circuit, wherein The First National Bank of Concord, New Hampshire, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Horace Gray, associate justice of the Supreme Court of the United States, this twenty-first day of September, in the year of our Lord one thousand eight hundred and ninety-seven.

HORACE GRAY,
Associate Justice of the Supreme Court of the United States.

31 On this eighteenth day of October, in the year of our Lord one thousand eight hundred and ninety-seven, personally appeared Frank S. Streeter, counsel for the First National Bank of Concord, before me, the subscriber, a notary public within and for the State of New Hampshire, and makes oath that on the fifteenth day of October, 1897, he delivered a true copy of the within citation to J. S. H. Frink, of Portsmouth, New Hampshire, counsel of record for Edward Hawkins, receiver.

Sworn to and subscribed this eighteenth day of October, 1897, before me—

[Seal of R. E. Walker, Notary Public, State of New Hampshire.]

R. E. WALKER,
Notary Public in and for the State of New Hampshire.

Endorsed on cover: Case No. 16,704. U. S. C. C. of appeals, 1st circuit. Term No., 187. The First National Bank of Concord, New Hampshire, plaintiff in error, *vs.* Edward Hawkins, receiver of the Indianapolis National Bank of Indianapolis. Filed October 21, 1897.

SUPREME COURT OF THE UNITED STATES
FILED JAN 17 1899
JAMES H. MCKENNEY, CLERK

OCTOBER TERM, 1898.

No. 257.

THE FIRST NATIONAL BANK OF CONCORD, NEW HAMPSHIRE, PLAINTIFF IN ERROR,

v.

EDWARD HAWKINS, RECEIVER OF THE INDIANAPOLIS NATIONAL BANK OF INDIANAPOLIS.

BRIEF FOR PLAINTIFF IN ERROR.

FRANK S. STREETER,
Counsel for Plaintiff in Error.

CONCORD, N. H.:
The Rumford Press.
1899.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 187.

THF FIRST NATIONAL BANK OF CONCORD, NEW HAMPSHIRE, PLAINTIFF IN ERROR,

v.

EDWARD HAWKINS, RECEIVER OF THE INDIANAPOLIS NATIONAL BANK OF INDIANAPOLIS, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case comes up on a writ of error from the United States Circuit Court of Appeals for the first circuit. The suit was brought by the defendant in error against the plaintiff in error in the Circuit Court for the District of New Hampshire, upon a plea of debt (Record, *p.* 4); and a trial was had by the court, trial by jury being waived. Record, *p.* 5. The court found that the defendant in error was the receiver of the Indianapolis National bank, which was duly organized and authorized to do business as a national banking association; that the bank was declared insolvent and ceased to do business on the twenty-fourth day of July, 1893, and the defendant in error was duly appointed and qualified as receiver of said bank on the 3d day of August, 1893, and took possession of the assets of the bank on the 8th day of the same month; that the capital stock of the bank was 3.000 shares of the par value of $100 each; that on the 25th day of October, 1893, an assessment was ordered by the comptroller of $100 per share on the capital stock of the bank, to enforce the

individual liability of shareholders, and an order was made that such assessment be paid on or before the 25th day of November, 1893, and the plaintiff in error was duly notified thereof. The court also found that the plaintiff in error was a duly organized National banking association doing business at Concord, N. H.; that on the 21st day of May, 1889, with a portion of its surplus funds, it purchased of a third party 100 shares of the stock of the Indianapolis National bank as an investment, and has ever since held the same as an investment; that since its purchase of said stock, its name has appeared upon the books of the Indianapolis bank as a shareholder of 100 shares of the stock; that during such holding it received annual dividends declared by the Indianapolis bank prior to July, 1893; and that it has not paid said assessment or any part thereof. Record, *p.* 6.

Upon the foregoing facts the court ruled that the defendant in error was entitled to recover; and the plaintiff in error duly excepted thereto upon the following grounds:

First. That the plaintiff in error, as a national banking association, had no power or authority to purchase with its surplus funds, as an investment and hold as such, shares of stock in another national banking association, as such purchase and holding are *ultra vires* of the corporation.

Second. That the defendant, as a national banking association, has no power or authority to incur any liability to pay the assessment sought to be recovered in this case.

Third. That as a matter of law, the defendant is not liable upon the facts found, to pay the assessment sought to be recovered in this case. Record, *p.* 7.

Thereupon the plaintiff filed a bill of exceptions to the ruling of the court upon said statement of facts, which on August 11, 1896, was duly allowed (Record, *pp.* 7, 8), and on the 24th day of August, 1896, judgment was rendered by said circuit court against the plaintiff in error. Record, *p.* 9.

Thereupon the plaintiff in error filed a petition for a writ of error to the Circuit Court of Appeals for the first circuit, together with an assignment of errors (Record, *p.* 9), in which it was claimed that there was manifest error in the ruling of the circuit court, that the defendant in error is entitled to recover upon the facts found by the court, as hereinbefore set forth, to which ruling the defendant in error duly excepted, as above set forth. Record, *pp.* 9, 10.

Upon said writ of error, a hearing was had before the Circuit Court of Appeals upon said alleged errors, when on March 5, 1897, the judgment of the circuit court was affirmed with interest, and with costs of that court to the defendant in error. Record, *pp.* 13, 14, 15. Whereupon the defendant in error filed a motion for a rehearing in said Circuit Court of Appeals, which motion was denied. Record, *pp.* 15–18. Afterwards the defendant filed in said Circuit Court of Appeals, an assignment of errors claiming,

First. That there was error in the ruling that the defendant in error was entitled to recovery, in that,

1. The plaintiff in error as a national banking association has no power or authority to purchase with its surplus funds as an investment and hold as such, shares of stock in another national banking association; such purchase and holding are *ultra vires* of the corporation.

2. The plaintiff in error as a national banking association has no power or authority to incur any liability to pay the assessment sought to be recovered in this case.

3. As a matter of law, the plaintiff in error is not liable upon the facts found to pay the assessment sought to be recovered in this case.

Second. That said Circuit Court of Appeals erred in making its order on the fifth day of March, 1897, affirming the judgment of the said circuit court, with interest and costs of said Circuit Court of Appeals to the defendant in error.

Third. That said Circuit Court of Appeals erred in not sustaining the writ of error there before it and not reversing the judgment entered in this action in the circuit court.

SPECIFICATION OF ERRORS RELIED UPON.

The following is a specification of errors relied upon which are asserted and intended to be relied upon in this brief and the argument thereon. The Circuit Court of Appeals erred in ruling that the defendant in error was entitled to recover, in that,

1. The plaintiff in error as a national banking association has no power or authority to purchase with its surplus funds as an investment and hold as such, shares of stock in another national banking association; such purchase and holding are *ultra vires* of the corporation.

2. The plaintiff in error as a national banking association has no

power or authority to incur liability to pay the assessment sought to be recovered in this case.

3. As a matter of law, the plaintiff in error is not liable upon the facts found to pay the assessment sought to be recovered in this case.

The error in the respects above enumerated fully appears from the printed opinions of the said Circuit Court of Appeals. Record, *pp.* 13, 17.

BRIEF OF THE ARGUMENT.

I.

The recent decision in California National Bank v. Kennedy, 167 *U. S.* 362, *determines the point raised in this case.*

In *California National Bank* v. *Kennedy*, 167 U. S. 362, it was held that stock of a savings bank, not taken as security or acquired in the course of the business of banking, cannot be purchased or dealt in by a national bank. The fact was the national bank held the savings bank stock as a purchaser; it did not take the stock to protect itself against loss for money previously loaned; it did not take it as collateral security; it attempted to engage in the business of dealing in the stock of another corporation. Precisely the same state of material facts exist in the case at bar with reference to the manner in which the First National bank of Concord acquired and held stock in the Indianapolis National bank; and the same legal result necessarily and logically follows.

In denying the petition of the plaintiff in error for a rehearing, in the Circuit Court of Appeals, *Putnam, Circuit Judge*, says, referring to *Bank* v. *Kennedy* (Record, *p.* 17, 82 Fed. 301):

"The issue considered by the supreme court was the liability of a national bank as a stockholder in a state savings bank, while the question before us was as to its liability as a stockholder in another national bank. The question discussed by the supreme court was more largely that of *ultra vires* than that of the policy of the statutes relating to national banking associations, and its line of decisions, which we understood to bind us in the case at bar, were not particularly noticed by it."

The only distinction suggested between the two cases is, that in the one case the stock held by the national bank was savings bank stock, in the other it was national bank stock. But can it be seriously contended that the power of a national bank to hold stock

depends upon the question whether the stock is issued by one corporation or by another? The power, if it exists at all, is derived from the act of congress.

"The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of these powers implies the exclusion of all others not fairly incidental."

Central Trans. Co. v. *Pullman Co.*, 139 U. S. 24.

By section 5,136, Rev. Stats., a national banking association is authorized,—

"To exercise by its board of directors, or duly authorized officers and agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title."

No power is here granted to national banks to buy and sell stocks generally; nor is such power incidental to the business of banking.

Morse, Banks & Banking, 1,213;
First National Bank v. *Exchange Bank*, 92 U. S. 122;
Logan County N. Bank v. *Townsend*, 139 U. S. 67, 73;
Royal Bank of India's Case, L. R. 4 Ch. App. 252;
Fowler v. *Scully*, 72 Pa. St. 456;
Weckler v. *National Bank*, 42 Md. 581;
Nassau Bank v. *Jones*, 95 N. Y. 115.

If, then, the general proposition, supported as it is by the authorities, is true, that a national bank cannot engage in the business of buying and selling stocks, there is no room for the inconsistent and contradictory inference, that it may invest its surplus in the stock of another national bank, but not in the stock of a savings institution. If congress has not given it power to act in the one case, it has not in the other. No reason can be suggested why such power should be deemed incidental to the business of banking when the stock in question happens to be national bank stock, and not incidental when it happens to be some other corporate stock. None of the cases bearing upon this general subject make or suggest such a distinction, excepting only the remark of the circuit judge, below, in his

"Upon this branch of the case the question for solution is, therefore, whether the individual liability of stockholders provided for by section 10, above quoted, is in the nature of a penalty, or whether it is, as plaintiffs contend, based on a contract between the stockholders and the creditors of the company. We think the liability imposed by section 10 is a liability arising upon contract. . . . Everyone who becomes a member of the company by subscribing to its stock, assumes this liability."

Cook (Stock and Stockholders, *s.* 223) says:

"But the usual statutory liability of stockholders is not a penalty. The courts are unanimous in holding that where, by statute the stockholders in a corporation, instead of being relieved entirely from liability to corporate creditors, are only partially relieved therefrom, the additional liability is a contract liability, and will be enforced by the courts of any state. In other words, the ordinary statutory liability of stockholders is a contract liability, and will be enforced as such by the courts of all the states."

See, also, *Hodgson* v. *Cheever*, 8 Mo. App. 321;
Manville v. *Edgar*, 8 Mo. App. 324;
Quenman v. *Palmer*, 117 Ill. 619;
Aulhman's Appeal, 98 Pa. St. 505;
Sackett's Harbor Bank v. *Blake*, 3 Rich. Eq. 225;
Woods v. *Wicks*, 7 Lea 40;
Van Riper, ex parte, 20 Wend. 614;
Grand Rapids Bank v. *Warren*, 52 Mich. 557;
Lowry v. *Inman*, 46 N. Y. 119;
Corning v. *McCullough*, 1 N. Y. 47.

In the opinion given by the court below (Record, page 14) it is said: "The liability sought to be enforced here arises by force of the statute, and is not contractual," citing *Keyser* v. *Hitz*, 133 U. S. 138, 151. One question in that case was whether a married woman had capacity to become the owner of stock in moneyed corporations. It was held that she had, and that consequently she became liable to assessment upon national bank stock legally held by her as any other legal holder. In other words congress had given her the requisite capacity to hold national bank stock, and her liability to assessment upon her stock was not enforced upon the ground that it was a penalty, or that it was not founded upon principles ordinarily governing contracts. Indeed that question was not raised or discussed in that case. For similar reasons cases like *In re Reciprocity Bank*, 22 N.

Y. 9, *Witters* v. *Sowles*, 32 Fed. 767, and *Robinson* v. *Turrentine*, 59 Fed. 554, are not in print.

In the case of *Foster* v. *Chase*, 75 Fed. 797, it was held that a father who bought national bank stock for his minor children was himself liable to an assessment thereon, and not the children, on the ground that "assent is necessary to becoming a shareholder, subject to this liability, in a national bank; and as the minors could not give their assent, that is, could not make a valid contract, they could not authorize their father to do so for them." And the court say:

"This liability has been sought for defendant to be likened to that of married women becoming shareholders; but that has been where, and because the law of the place authorized them to become such."

If, therefore, the Concord bank had the legal capacity to contract for the purchase of the stock in question it may be liable to this assessment; otherwise, it is not.

IV.

The Concord Bank had no power to make the contract, and it cannot be enforced against it.

It purchased the stock as an investment with its surplus earnings. It is not claimed that it took it on account of a preëxisting debt, or as collateral security. It assumed to exercise the power of going into the stock market and dealing in stocks, a power which *Bank* v. *Kennedy* decides it did not possess. The question then is whether that case ought to be overruled.

(*a*) It is familiar law that a corporation possesses only such powers as are expressly conferred upon it by its charter or the law to which it owes its existence, and such as are necessarily incident thereto.

Dartmouth College Case, 4 Wheat. 518, 636;
Bank v. *Dondridge*, 12 Wheat. 64, 68;
Head v. *Ins. Co.*, 2 Cranch. 127;
Beaty v. *Knowler*, 4 Pet. 152;
Bank v. *Earle*, 12 Pet. 519, 587;
Perrin v. *Canal Co.*, 9 How. 172;
Oregon Railway Co. v. *Railway Co.*, 130 U. S. 1;
Logan County N. Bank v. *Townsend*, 139 U. S. 67;
Central Trans. Co. v. *Pullman Co.*, 139 U. S. 24;
Reese, ultra vires, ss. 8–15.

(*b*) The power to purchase shares of stock in other corporations as an investment is not specially conferred by the National Banking Act. If it exists at all it must be upon the ground, that it is a necessary incident to the general business of banking. The statute (Rev. Stats. *s.* 5136) authorizes national banking associations to exercise "all such incidental powers as shall be necessary to carry on the business of banking; . . . by buying and selling exchange, coin and bullion." No authority is here given to buy and sell stocks, or to buy and sell horses or other personal property. Dealing in stocks is excluded as much as dealing in horses.

In *First National Bank* v. *Exchange Bank*, 92 U. S. 122, it was held that:

"Dealing in stocks is not expressly prohibited, but such a prohibition is implied by the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money, so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks."

In *Fowler* v. *Scully*, 72 Pa. St. 456, the facts were that Fowler made a mortgage to Scully, as trustee of the First National Bank of Pittsburg, as security for future advances to be made by the bank to Fowler. The bank, through Scully, now seeks to foreclose the mortgage, against Vandirk, the assignee of the mortgagor, who sets up as a defense that the mortgage was void, being *ultra vires* and cannot be enforced even against him who brought with notice. The court say:

"In view of the rule of interpretation of such charters given to us by the Federal Courts, and the maxim—*expressio unius est exclusio alterius*, the argument might close with the terms of the power to loan money on *personal* security; for, agreeably to this rule and maxim, no other security than personal can be taken for money lent. . . . The reasons are manifest. The business of a bank is commercial, not that of dealing in real estate, brokerage, etc. It therefore does not buy and sell real estate, ground rents, mortgages, stocks, produce, etc. . . . The evident intention of congress is, that national banks should be institutions of commerce, not dealers in real estate, stocks or produce."

In *Weckler* v. *National Bank*, 42 Md. 581, it was decided that a national bank has no authority to engage in the business of selling

bonds on commission. In discussing the statute which contains the grant of powers to banking corporations, the court say:

"No construction can be given to these terms as used in this statute so broad as to comprehend the authority to sell bonds for third parties on commission, or engage in business of that character. The appropriate place for the grant of such a power would be in the clause conferring authority to 'buy and sell,' but we find that limited to specific things, among which bonds are not mentioned, and upon the maxim, *expressio unius est exclusio alterius*, and in view of the rule of interpretation of corporate powers before stated, the carrying on of such business is prohibited to these associations."

The question raised in *Nassau Bank* v. *Jones*, 95 N. Y. 115, as stated by the court, related to "the right of a banking corporation chartered under the laws of this state to subscribe for the stock of a railroad corporation." The general banking law of New York, so far as it is material to this question, is almost identical with the National Banking Act. The bank claimed that Jones bought certain railroad stock under an agreement to hold one half of it for the bank. The court say:

"It is clear that a banking corporation cannot enter into a contract of this character, unless it has authority under its charter to become a subscriber for the stock of railroad corporations, and thereby assume the obligations to which stockholders are subject by statute. . . . Even a cursory view of the provisions of the statute under which the plaintiff was organized, and the cases giving construction to the powers thereby conferred, renders it quite clear that the contract under which the plaintiff claims was not only *ultra vires* but contrary to public policy. . . . The language employed in the act defines their powers and duties, and excludes by necessary implication a capacity to carry on any other business than that of banking, and the adoption of any other methods for the prosecution of such business than those specially pointed out by the statutes. . . . The implied restrictions upon the corporations formed under the act of 1838, against transacting any other business than that of banking, and the careful definition given to that word, not only by lexicographers, but also in the reported cases, would seem clearly to establish a want of authority in such corporations to engage in any business transactions, excepting such as relate to the collection of business paper, the buying and selling of coin and exchanges, and the loaning of moneys upon the securities pointed out by the statute. Certainly, the utmost liberality in the construction of the powers given to these corporations would not include the right claimed for them in this case. . . . The spirit of the law, as well as a sound public policy, forbid these institutions from risk-

ing the moneys intrusted to their care in doubtful speculations or enterprises."

In *Royal Bank of India's Case*, L. R. 4 Ch. App. 252, the Royal bank held certain shares of stock in another bank as collateral for several years, receiving the dividends and being treated as the owner thereof. Upon the failure of the latter bank, the question arose, whether the Royal bank could be compelled to contribute as a shareholder. Its charter gave it very wide powers as to carrying on the business of banking. The court remark:

"What, then, was the transaction? I quite agree that the Royal Bank of India had no authority to speculate in shares, and that if it had gone upon the Stock Exchange and bought shares as a speculation, such a proceeding would have been *ultra vires*, and all that has taken place would not have been enough to constitute the Royal Bank of India shareholders in this bank, or prevent them from repudiating these shares."

While this may be said to be *dictum*, the positiveness of the assertion shows that it was not even regarded as a debatable question; so that the quotation is valuable as an authority.

See also *Wiley* v. *National Bank*, 47 Vt. 546;
Whitney v. *National Bank*, 50 Vt. 388;
Talmage v. *Pall*, 7 Selden 328;
Franklin Company v. *Bank*, 68 Me. 43;
Crocker v. *Whitney*, 71 N. Y. 161.

It is safe to say that there are no respectable authorities holding that a national bank has the power, either express or implied, to engage in the business of dealing in stocks; so that, it is submitted, that the proposition that the First National bank of Concord had no corporate power to invest its money in the speculation of buying stock in the Indianapolis bank, cannot be successfully attacked or overthrown. That the purchase of stock to-day with a portion of its surplus funds, which it may sell to-morrow, is a dealing in stock,—is a pure speculation,—cannot be doubted. Whether it is a prudent or wise speculation, is wholly immaterial.

While a bank may, for the purpose of collateral security or for its own protection against its debtors, acquire stock in other corporations, on the ground that such power is a necessary incident in the prosecution of its legitimate business, the buying of stock for speculative purposes, which is unnecessary and not incidental to the purposes of the corporation, is the attempted exercise of a power which

does not exist, because it never was granted. And the cases which hold that a bank may become a stockholder in another corporation, when necessary for its own protection, are careful to state in substance that it could not purchase stock as an investment or for speculation; that is, it cannot engage in the business of dealing in stocks, as the Concord bank attempted to do in this case.

It is also to be noted that the power to hold stock as collateral security does not fall within the general powers conferred by statute, but is merely incidental thereto,—incidental to the power of "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt," and of "loaning money on personal security." It is purely and simply incidental and subordinate, and if the bank, for its own protection, is compelled to take the stock and become a stockholder, it does it, not by virtue of any general legislative authority to deal in stocks, but on the ground of necessity growing out of its general power to loan money.

(*c*) The case of *Citizens' Bank* v. *Hawkins*, 71 Fed. 369, cannot be sustained. Practically the same question was raised in that case as is under consideration here, and the assessment was held to be legal, on the ground that the acquisition of the stock was within the incidental powers of the bank, and that the facts did not present a case of the exercise of a power not in any event given. But it is evident the court misapprehended the real question involved. The test is not whether the bank had capacity to acquire stock for any purpose, but whether it had the power to make the contract by which the stock came into its possession. If it did not possess that power, if it was absolutely without authority to bind itself under the terms of the contract, its attempt to do so was entirely ineffectual, and it did not bind itself. It acquired no rights and assumed no liabilities by virtue of its *ultra vires* and absolutely void contract. If the bank was authorized to contract for stock in certain exceptional cases, it would be absurd to say that it, therefore, had the power to make any contract it might desire for the acquisition of stock. The transaction was *ultra vires* and void, not because the bank could not hold stock or could not under any circumstances become a stockholder, but because it had no power whatever to engage in the business of dealing in stocks, which was the business it attempted to do in that case. The true contention before the court was that the bank not having the power to make the contract, could not assume the liabilities of a stockholder under that void contract; the decision was that, having

power to hold stock for certain purposes, it could assume the liabilities of a stockholder under all contracts, void as well as valid.

The authorities cited in that case do not sustain the decision. They are cases where the question of *ultra vires* was raised by third parties, not by the corporations. That decision, if generally followed and recognized, would practically abolish the doctrine of *ultra vires*, and render valid and binding, contracts otherwise void and uninforcible. It admits that the bank was not authorized to make the contract by which it acquired the stock, but holds that having in fact made it, it is in law bound by it; in other words that incapacity becomes capacity by the mere act of the parties. If such a result should be sustained, then a most convenient, effective, and inexpensive method has been devised, without the intervention of the legislature and in direct opposition thereto, by which unlimited power may be conferred upon corporations; and the doctrine of *ultra vires* as between the parties becomes a dead letter.

(*d*) It may be argued that if it appears from the books of the Indianapolis bank, that the Concord bank held this stock, the court will conclusively presume that the Concord bank acquired it in some legitimate way. But that cannot be the statement of a sound principle of law. If, for instance, stock happens to stand in the name of an infant or of a lunatic, he certainly is not bound to respond to an assessment levied on the stock. And this was distinctly held in the case of an infant in *Foster* v. *Chase*, 75 Fed. 797. And why? Because the party sought to be charged had no capacity to make the contract by which he assumed to acquire the stock. Therefore, the matter stood as though no contract had been made, and no physical transfer had been made on the books of the corporation.

So in this case the Concord bank, not having the legal capacity to make the contract under which it attempted to acquire this stock by having it transferred to it by the Indianapolis bank, accomplished nothing; and it is submitted that the court must consider this question of capacity in the case of a national bank, as well as in the case of an infant or a lunatic. Indeed there is more reason for this examination when the name of a national bank appears as the holder of stock in another bank or corporation; for, the general rule being that it cannot in law acquire such property, interested parties are by that fact alone put upon inquiry to ascertain whether its reputed holding falls within any exception to the general rule. It follows that the creditors of the Indianapolis bank, when they discovered

that the First National bank of Concord appeared on the books of the former bank as a stockholder, were chargeable with knowledge of its general want of capacity, and ought to have ascertained whether it held the stock as collateral security or as a speculative investment under its contract of purchase. And this is only stating a fundamental principle of corporation law; that one dealing with a corporation is chargeable with knowledge of its corporate limitations. Reese, *Ultra Vires*, *ss.* 53, 54.

V.

The Concord Bank is not estopped to insist upon the defence of ultra vires.

It is sometimes said, in a somewhat careless manner, that no one but the government or the stockholders can take advantage of *ultra vires* acts. But it is to be observed that such remarks usually occur in cases where *debtors* of the corporation seek to avoid the payment of their debts by attacking the capacity of the corporation to make the contract. A very casual examination of the cases will disclose the fact that the corporation itself, representing its stockholders and its creditors, may set up as a valid defense to an action upon a contract its incapacity to make the contract. If it has received money of the other party under the void contract, it may be compelled to return it, not in pursuance of the contract, but in express repudiation of it, upon general *indebitatus assumpsit*.

"In such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm the unlawful contract."

Central Trans. Co. v. *Pullman Co.*, 139 U. S. 24.

In delivering the opinion of the court in *Penn. R. R. Co.* v. *St. Louis &c. Co.*, 118 U. S. 290, *Mr. Justice Miller* remarks:

"But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court can infuse any vitality into it. Looking at the case as one where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere

as the matter stands. We know of no well considered case where a corporation which is party to a continuing contract which it had no power to make, seeks to retract and refuses to proceed farther, can be compelled to."

"Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. . . . . Though they delayed its performance for several years, it was nevertheless, a rightful act when it was done. Can this performance of a lawful duty, a duty which it owed to the stockholders of the company and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can, is, in our opinion, to hold that any act performed in execution of a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts."

Thomas v. *Railroad Co.*, 101 U. S. 85.

It is also necessary in this connection to note a distinction between the effect of an act which is properly *ultra vires*—that is, an act beyond the corporate power of the corporation to perform, and the effect of an act within the powers granted, but in doing which the corporation has failed to comply with certain legal formalities. In the latter case the corporation may be estopped to insist on the defective execution of the power, having derived a benefit from the act,—but in the former case the act as against the corporation is absolutely void.

In *Central Trans. Co.* v. *Pullman Co.*, before cited in his very able and lucid opinion, *Mr. Justice Gray* says:

"It was argued in behalf of the plaintiff that, even if the contract sued on was void, because *ultra vires* and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to this action to recover the compensation agreed on for that period. But this argument, though sustained by decisions in some of the states, finds no support in the judgments of this court. . . . The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:

"A contract of a corporation which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in

the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

"When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisities to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

These principles were applied in *Weber* v. *National Bank*, 50 Fed. 735. See also *Chicago &c. Railroad Co.* v. *Union Pacific Railway Co.*, 47 Fed. 15.

The same law prevails with reference to municipal bonds issued without authority.

Marsh v. *Fulton County*, 10 Wall. 676;
South Ottawa v. *Perkins*, 94 U. S. 260;
Parkersburgh v. *Brown*, 106 U. S. 487;
Bissell v. *Spring Valley*, 110 U. S. 162;
Dixon County v. *Field*, 111 U. S. 83;
Merrill v. *Monticello*, 138 U. S. 673.

In this case the action is upon a continuing or executory contract; it is continuing and executory so far as the liability to assessment is concerned; and to say that the Concord bank cannot now interpose this defense to this void contract, is to say that it cannot perform a duty it owes to the public, to its stockholders, and to its creditors. All the parties to this contract are chargeable with knowledge, as a matter of law, that it was beyond the power of the Concord bank to engage in the business of dealing in stocks and to invest its money as a speculation in the stock of the Indianapolis bank. They knew the contract they were making was void. They cannot be allowed to urge their ignorance in fact. Nor indeed do they insist upon any want of knowledge as an excuse for this unjustifiable and nugatory compact. But while the plaintiff's right of action is founded upon

nothing, while it never existed as a direct legal obligation, it is said that the defendant is estopped to take that position and to insist upon its rights thereunder. Why is it estopped? The Indianapolis bank was in possession of all the facts; it was not misled or deceived in any respect; and the Concord bank has received nothing under the contract which it is not accountable for on a proper proceeding. On these facts, it is not apparent how there can be any estoppel, or why the defense of *ultra vires* is not available. Taylor, Priv. Corp. *ss.* 275–281.

The principle of estoppel was urged in *Davis* v. *Railroad*, 131 Mass. 258. It was there held to be beyond the powers of a railroad corporation and of a corporation formed for the manufacture of musical instruments, to guarantee the payment of the expenses of a musical festival, and that no action could be maintained thereon, although the festival had been held and expenses incurred in reliance upon the guaranty,—a plain case of estoppel, if the corporations had had the power to make the contract. The obvious reason is that corporate power to do an act cannot be supplied by estoppel. Even the express assent of all the stockholders to the unauthorized act does not legalize it. They cannot ratify what they had no legal, corporate power to do in the first instance.

Ashbury, etc., Railway v. *Riche*, L. R. 7 H. L. 653.

In that case it was held that:

"A contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action."

And in *Thomas* v. *Railroad*, 101 U. S. 71 (before cited), *Mr. Justice Miller* says, that that decision "represents the decided preponderance of authority, both in this country and in England, and is based upon sound principles."

See, also, *Attorney General* v. *Railway Co.*, 5 App. Cas. 473;
Smith v. *Smith*, 10 App. Cas. 119;
Wenlock v. *The River Dee*, 10 App. Cas. 354;
Trevor v. *Whitworth*, 12 App. Cas. 409.

National Bank v. *Whitney*, 103 U. S. 99, *Reynolds* v. *Bank*, 112 U. S. 405, and *Thompson* v. *Bank*, 146 U. S. 240, are not at all applicable to this case. In those cases the defense of *ultra vires* was

insisted upon, not by the bank, but by a third party, in order to avoid the payment of a just debt, or to obtain some other unjust advantage as against the bank and its stockholders. No sound reason can be discovered why such a party should be thus protected. Corporate limitations are imposed, not for the benefit of individuals dealing with the corporation, but for the protection of its stockholders and creditors, and the public.

McCormick v. *Bank*, 165 U. S. 538.

In *Davis* v. *Railroad*, *supra*, the court in discussing cases of this character, says (page 272):

"Several of the cases most relied on by the plaintiffs were not suits against a corporation to compel it to pay money for a purpose not within the scope of its charter, but suits by a corporation to recover money or property, which, when recovered, would be held for the lawful uses of the corporation." Citing *National Bank* v. *Matthews*, 98 U. S. 621.

And the court add, that remarks by the court in such cases to the effect that only the sovereign can take advantage of *ultra vires* acts are wholly *obiter dicta*.

There is, therefore, a broad distinction between cases of that character and the present case. If the defense of *ultra vires* is not sustained in a case like this one, the limitation of corporate powers is a useless formality in legislation, so far as the corporation and those with whom it contracts, are concerned. If such a result is sanctioned by law, then the so-called incapacity of corporations to do things not authorized by law, and the so-called incapacity of married women and infants in certain particulars, are practically abolished, provided parties possess sufficient recklessness to proceed to do the acts, as a matter of fact, which, as a matter of law, they have not the capacity to do. And on the same theory, the more that is done under an *ultra vires* contract, the more anxious will the court be to sustain and legalize the illegal engagement.

If, therefore, this contract was *ultra vires* of the Concord bank,—if the power to engage in buying and selling stock was not granted to it by congress, then it is not liable to respond to this assessment, one of the necessary incidents in the void contract which it attempted to assume. It is of the greatest importance that banks and other corporations and people dealing with them should understand, that an agreement entered into with them which is not justified and

authorized by some power expressly or impliedly granted in their charters or by the general law, is absolutely void, and that a void contract is not a valid one. It is important that the legislative intention should be carefully observed in ascertaining the extent of corporate powers, and in sanctioning only the exercise of such power as has been granted.

"A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforcible by the application of the doctrine of estoppel."

Union P. R. Co. v. *Chicago &c. R. Co.*, 163 U. S. 564.

Both authority and principle fully sustain the decision of this court in *Bank* v. *Kennedy*, *supra*, where the following statements of the law upon this subject occur:

"Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the nullity of an act which is an *ultra vires* act."

"The power to purchase or deal in stock of another corporation, as we have said, is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers expressly conferred. A dealing in stocks is consequently an *ultra vires* act. Being such, it is without efficacy. . . . Stock so acquired creates no liability to the creditors of the corporation whose stock was attempted to be transferred."

"The claim that the bank in consequence of the receipt by it of dividends on the stock of the savings bank is estopped from questioning its ownership and consequent liability is but a reiteration of the contention, that the acquiring of stock by the bank under the circumstances disclosed, was not void but voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void could not be confirmed or ratified."

No. 187.

Brf. of Carlisle & Kern for Def. in Error.

Filed Jan. 19, 1899.

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JAMES H. MCKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

No. 187.

THE FIRST NATIONAL BANK OF CONCORD,
Plaintiff in Error,

against

EDWARD HAWKINS, RECEIVER OF THE INDIANAPOLIS NATIONAL BANK,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

J. G. CARLISLE,
For Defendant in Error.

J. W. KERN,
Of Counsel.

The Evening Post Job Printing House, New York.

Supreme Court of the United States,

OCTOBER TERM, 1898.

No. 187.

THE FIRST NATIONAL BANK OF CONCORD,
Plaintiff in Error,

AGAINST

EDWARD HAWKINS, Receiver of the Indianapolis National Bank,
Defendant in Error.

Brief for Defendant in Error.

This writ of error is prosecuted to reverse a judgment of the United States Circuit Court of Appeals, for the First Circuit, affirming a judgment of the Circuit Court of the United States against the plaintiff in error, for the sum of $11,646.67 and costs. The only question in the case is, whether the Concord National Bank is liable, under the statute, for an assessment made against it by the Comptroller of the currency, as a shareholder in the failed National Bank of Indianapolis. The court below found and certified the following facts:

"The plaintiff is receiver of the Indianapolis National Bank of Indianapolis, which bank was duly organized and authorized to do business as a national banking association. The bank was declared insolvent and ceased to do business on the 24th day of July, 1893; the plaintiff was duly appointed and

qualified receiver of the bank on the 3d day of August, 1893, and took possession of the assets of the bank on the 8th day of the same month. The capital stock of the bank was 3,000 shares of the par value of $100 each. On the 25th day of October, 1893, an assessment was ordered by the Comptroller of $100 per share on the capital stock of the bank, to enforce the individual liability of shareholders, and an order made to pay such assessment on or before the 25th day of November, 1893, and the defendant was duly notified thereof.

The defendant, being a national banking association, duly organized and authorized to do business at Concord, N. H., on the 21st day of May, 1889, with a portion of its surplus funds, purchased of a third party, authorized to hold and make sale, 100 shares of the stock of the Indianapolis National Bank, as an investment, and has ever since held the same as an investment. The defendant bank has appeared upon the books of the Indianapolis National Bank as a shareholder of 100 shares of its stock, from the time of such purchase to the present time. During such holding the defendant bank received annual dividends declared by the Indianapolis Bank prior to July, 1893. The defendant has not paid said assessment or any part thereof."

After the judgment in the Circuit Court of Appeals this court decided the case of California National Bank *vs.* Kennedy, 167 U. S., 362, whereupon the plaintiff in error presented a petition for a rehearing, but it was denied for the reasons stated by Judge Putnam in the second Opinion, printed in the appendix hereto.

We insist for the defendant in error that under the National Bank Act the persons, except fiduciaries, in whose names the certificates of shares stand on the register, are liable as stockholders to an assessment for the payment of the debts of a failed association, no matter how the ownership or possession of the shares was acquired, and that this liability is not contractual but statutory. In the Kennedy

case the question as to the liability of one national bank on account of shares standing in its name on the records of another national bank was not involved, and therefore the act of Congress imposing the liability in such cases was not construed or applied by the court. The savings bank in which the national bank had acquired stock in that case was organized under the laws of California, and the only questions decided by this court were that the national bank possessed no legal authority or to acquire or become the owner of the shares by contract, and that, not having such authority, it could not be made liable on its attempted contract of purchase nor by estoppal arising from the mere fact that it had participated in the dividends. All this may be conceded without in the least affecting the real question in the present case, as we understand it.

The National Bank Act was intended to create a distinct currency and banking system and surround it with every possible safeguard for the security of note holders and depositors and other creditors, and in construing its provisions this paramount purpose cannot be properly disregarded. It would be tedious to enumerate all the requirements, prohibitions and regulations embodied in the law with a view of protecting those who deal with these institutions against loss, and it is not necessary to attempt to do so, as this court has been frequently called upon to consider them. Among other things it is provided (§ 5139) that the capital stock of each association shall be divided into shares of one hundred dollars each and shall be deemed personal property, and transferable on the books of the association, and that "every person becoming a shareholder *by such transfer* shall, in proportion to his shares, succeed to all the rights and *liabilities* of the *prior holder* of such shares." Section 5151 makes the shareholders individually responsible "equally and rateably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the

amount of their stock at the par value thereof, in addition to the sum invested in such shares;" and in order that persons giving credit to the association may know who are ultimately responsible for its obligations, section 5210 requires the president and cashier of every such association to cause to be kept at all times, in the office where its business is transacted, a full list of the names and residences of all the shareholders and the number of shares held by each. This list is to be at all times during business hours subject to the inspection of shareholders and creditors of the association. The name of the plaintiff in error, as the holder of one hundred shares of stock, appeared on this list from May, 1889, until the appointment of the receiver, and it participated in all the dividends declared during that time. The other shareholders and creditors could not know whether those shares had been acquired by purchase in the market as an investment of surplus funds, or in a lawful manner in the regular course of its business; and there is nothing in the statute which requires them to investigate that question. The list as it stands at the time of the failure of the association was intended by the statute to be conclusive evidence of the liability of the persons whose names appeared on it, no matter how they had acquired the shares. Any other construction of the statute would make it incumbent not only on other shareholders and the creditors, but upon the Comptroller of the currency, before making an assessment, to ascertain in what manner each shareholder appearing on the list had acquired the shares held by him, and whether or not he had made such a contract with the party from whom he acquired them, as would make him the *bona fide* and lawful owner of the stock.

The object of the statute was to afford a speedy and effective remedy to the creditors of a failed bank, and this object would be defeated in a great many cases if the Comptroller is obliged to

inquire into the validity of all the contracts by which the registered shareholders acquired their respective interests. Such a rule would produce great inconvenience, uncertainty and delay in winding up the affairs of insolvent banks, and unless there is some conclusive reason for its application, it ought not to receive the sanction of the courts. One of the most beneficial provisions of the national banking law, so far as it provides for the liquidation of insolvent associations, is that which authorizes the Comptroller to make assessments upon the shareholders to pay the debts, and this court, recognizing the policy of the law in this respect, has decided that an assessment made for that purpose is conclusive both as to the necessity for making it and as to the amount of each shareholders' liability Kennedy *vs.* Gibson, 8 Wall., 498; Casey *vs.* Galli, 94 U. S., 673; Same *vs.* Same, 94 U. S., 680; Germania Bank *vs.* Case, 99 U. S., 628.

It was said by the court in White *vs.* Dowley, 94 U. S., 527, that the list of stockho'ders which the law requires to be kept posted in the bank "was designed to furnish to the public dealing with the bank a knowledge of the names of its incorporators and to what extent they might be relied on as giving safety to those dealing with the bank." National banks are not expressly prohibited by the law from acquiring or holding shares of stock in other corporations, but, on the contrary are permitted to do so under certain circumstances, as this court has frequently decided. See Bank of California *vs.* Kennedy, 167 U. S., 362. When its name appears as a shareholder on the books of another national banking association as required by law, how are the persons dealing with and giving credit to that association to know that the shares have not been acquired in a lawful manner? How is the Comptroller of the currency to know when he finds it necessary to make an assessment, that the national bank whose name appears as a shareholder did not acquire the stock in the regular course of its business as collateral secur-

ity for a loan, or by some other means in strict conformity with the law? In the absence of evidence to the contrary, the presumption is, of course, that the shares were lawfully acquired, and this presumption is, we think, made conclusive by the terms of the statute, especially in a case where the bank in whose name the shares appear has made no attempt to repudiate the ownership or liability until after the failure of the other institution, and after the statutory rights of creditors have accrued.

If a pledgee or trustee has the shares transferred to him, and his name appears on the books as a pledgee or trustee, he is not personally liable for an assessment, because the record itself is notice to the public that he is not the real and beneficial owner; but if they are transferred to him and his name appears without anything to show the purpose for which he holds them or the capacity in which he holds them, he is liable, because the public is bound to presume that he holds in his own right as absolute owner, and because the law declares that, "every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares." The prior holder of the shares which were transferred to the plaintiff in error was undoubtedly liable to an assessment if the failure had occurred before the transfer, or at least there if nothing in the case conducing to show that he was not liable. He sold the shares and was paid for them; they were regularly transferred to the purchaser, who took his place on the books of the bank, and he had from that time no further interest in them or claim upon them. He did not make a fraudulent transfer for the purpose of evading liability, nor could he have rescinded the contract after it was completed upon the ground that his vendee had no capacity to make the purchase. No court can now rescind the contract, and restore the shares to the prior holder, and thus render him liable for the assessment. He is therefore fully and finally re-

leased from any liability of any nature for or on account of this one hundred shares of stock. It is evident then that unless the transferee has taken his place, one hundred shares of the capital stock of the Indianapolis National Bank have been totally extinguished, so far as they constituted a part of the security expressly provided by law for the benefit of the creditors of that institution. If they were legally extinguished when the transfer was made to the plaintiff in error, of course the capital stock of the Indianapolis Bank was legally reduced to that extent at the very momemt of the transfer. But the law specifically provides the only manner in which the capital stock of these institutions can be reduced, and by that method of reduction publicity is given to the fact in order that all who deal with the association may know that the security has been diminished. Revised Statutes, § 5143. We do not think these shares have been extinguished. The plaintiff in error agreed to purchase them, paid for them out of its surplus earnings, took possession of them, had them transferred on the books, paid taxes on them and received dividends on them for several years. The legal and equitable title to the shares must be vested somewhere, and unless the National Banking Act has failed to accomplish its purpose in a very important particular, the liability attached to them must exist somewhere.

If the First National Bank of Concord had failed, would not these shares have been assets in the hands of its receiver to be sold by him and converted into money the same as other assets? Would not his sale and transfer have invested the purchaser with a good title, and would he not have become liable for an assessment? Or, if the Concord National Bank had itself sold and transferred the shares at any time before the institution of this action, and the name of the purchaser had appeared on the books of the defendant in error, would he not have acquired a good title and been liable for

an assessment? Would he not have been liable for an assessment whether he acquired a good title or not, if the shares had been transferred to him, and his name appeared on the books? We submit that these questions cannot be correctly answered without assuming, as a legal proposition, that the shares are now, and always have been, in existence, and that the statutory liability is now, and always has been, attached to them in the hands of every actual holder, provided they were transferred to him and his name appeared as a shareholder upon the books of the association which issued the stock. When these things have been done, we do not think that the Comptroller of the currency, or any creditor, or any court, is required by the law to investigate the question of title and determine whether or not the actual holder of the shares is the actual legal owner, or to take any notice of the contract, or form of contract, by which he became the holder or had the transfer made. He may have procured them from the real owner by force or fraud, or from a lunatic or idiot by a void contract, and still he would be liable for an assessment under the statute, if he continued to be the actual holder of the shares, and nobody else appears on the books as their owner. When assessments are made and sued upon both parties to the contract or alleged contract under which the transfer was made are not before the court, and it cannot, therefore, undertake to determine the question of legal title and enforce the liability against the real debtor. It can look only to the record which the parties themselves have made in compliance with the statute and leave the responsibility where the statute places it.

It is not necessary to discuss in this case the general doctrine of legal or equitable estoppel in its application to *ultra vires* contracts. The decisions cited in the case of California Bank *vs.* Kennedy, 167 U. S. 362, in support of the proposition that a corporation is not estopped to assert the nullity of such a contract, are not applicable here, because we are

not insisting upon an estoppel arising from a contract or attempted contract, but upon an express provision of the statute imposing the liability. The case of McCormick *vs.* Market Bank, 165 U. S., 538, was the only one cited which related to the powers of national banks, and that was an ordinary instance of an *ultra vires* contract, and did not involve any question of statutory liability.

In Anderson *vs.* Philadelphia Warehouse Co., 111 U. S., 479, Mr. Chief Justice Waite, speaking for the Court, said: "It is well settled that one who allows himself to appear on the books of a national bank as an owner of its stock is liable to creditors *as a stockholder*, whether he be the absolute owner or a pledgee only, and that if a registered owner, acting in bad faith, transfers his stock in a failing bank to an irresponsible person, for the purpose of escaping liability, or if his transfer is colorable only, the transaction is void as to creditors." National Bank *vs.* Case, 99 U. S., 628; Bowden *vs.* Johnson, 107 U. S., 251. But in the case from which this extract is taken the name of the pledgee did not appear on the books of the bank and it had exercised none of the powers or rights of a stockholder, and the court therefore held that it was not liable for an assessment. In National Bank *vs.* Case, 99 U. S., 628, the name of the pledgee, which was a national bank, had appeared on the books of the bank in which the stock was held, but an attempt had been made to transfer it to another party. The court said:

"It is thoroughly established that one to whom stock has been transferred in pledge, or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors * * * For this, several reasons are given. *One is that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock*, and his denial of ownership is inconsistent with the representations he has made; another is, that by taking the legal title *he has released the former owner;* and a third is, that after

having taken the apparent ownership, and thus become entitled to receive dividends, vote at elections and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibility of a stockholder."

Numerous authorities were cited in support of those propositions, and the court continued, "When, therefore, the stock was transferred to the Germania Bank, though it continued to be held merely as a collateral security, the bank became subject to the liabilities of a stockholder, and the liability occurred the instant the transfer was made. At that instant the liability of Phelps, McCulough & Co. ceased." For other cases bearing upon this question see Pullman *vs.* Upton, 96 U. S., 628; Sanger *vs.* Upton, 91 U. S., 56; Upton *vs.* Tribilcock, *Id.*, 45: Webster *vs.* Upton, *Id.*, 65. In Casey *vs.* Galli, 94 U. S., 673, the court, speaking of persons in whose names the shares appeared on the books of the bank, said:

"Parties must take the consequence of the position they assume. They are estopped to deny the reality of the state of things which they have made to appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real and the law properly so regards it."

In the present case not only sound ethics, but, as we think, the express language of the act of Congress imposing the liability on the party to whom the shares are transferred on the books of the bank, estop the plaintiff in error to deny its obligation to pay the amount and thus deprive the creditors of the failed bank of a security which the law clearly intended to afford them. A question somewhat analogous to the one here presented arose and was decided in Bank of Redemption *vs.* Boston, 125 U. S., 60. Under the laws of Massachusetts a tax was imposed upon the shares of stock in banks, and it was provided that if the tax should not be paid, the bank should be liable for

it. The Bank of Redemption paid the tax and brought an action to recover it back, and among the grounds relied upon to maintain the claim it was alleged that 1,448 shares of the stock upon which the tax had been collected were held by other national banks; but this court said:

The manifest intention of the law is to permit the State in which a national bank is located, to tax, subject to the limitations prescribed, all the shares of its capital stock—without regard to their ownership. The proper inference is that the law permits, in the particular instance, the taxation of the national banks owning shares of the capital stock of another national bank, by reason of that ownership, on the same footing with all other shares."

The court evidently did not think that the shares had been extinguished simply because they were held by corporations not authorized by law to purchase and own them. The case of Robinson *vs.* Turrentine, 59 Fed., 554, expressly decided the very point now under consideration. The case arose in North Carolina, and the question was whether a married woman in whose name shares of stock appeared on the books of a national bank was liable to an assessment, notwithstanding the laws of that State did not permit her to make a valid contract without the consent of her husband.

The court said:

"The liability of a married woman for an assessment upon national bank stock, while it in no wise grows out of a contract, is one of the class of liabilities which may be enforced in an action in form *ex contractu*, and this fact is one which has often in analogous cases caused confusion in minds accustomed only to the ideas of the common law. The liability of an infant or an insane person for necessaries has often been called a liability arising *ex contractu*, solely by reason of the form of the action to enforce it. So of a suit for a statutory penalty. * * * The liability of the defendant here is *quasi-contractual;* is treated for certain purposes growing out of the limitations of ancient forms of action as contractual; *but it does not arise from a*

contract, and is not affected by the Act of 1871-2, *supra* (the North Carolina Statute)."

See Welles *vs.* Larrabee, 36 Fed., 866; also Witters *vs.* Somers, 32 Fed., 767, which decides that the liability is not contractual but statutory.

In Pauly *vs.* State Loan and Trust Company, 165 U. S., 606, Mr. Justice Harlan, in delivering the unanimous opinion of the court, said: "It is true that one who does not in fact invest his money in such shares, but who, although receiving them simply as collateral security for debts or obligations, holds himself out on the books of the association as true owner, may be treated as the owner, and therefore liable to assessment when the association becomes insolvent and goes into the hands of a receiver. But this is upon the ground that, by allowing his name to appear upon the stock list as owner, he represents that he is such owner, and he will not be permitted, after the bank fails and when an assessment is made, to assume any other position as against creditors. If, as between creditors and the persons assessed, the latter is not held bound by that representation, the list of shareholders required to be kept for the inspection of creditors and others would lose most of its value." In that case the previous decisions of this court bearing upon the question of a shareholder's liability to the creditors of a failed national bank were reviewed, and it was stated as one of the rules deducible from them: "That if the owner transfers his shares to another person as collateral security for a debt due to the latter from such owner, and if, by the direction or with the knowledge of the pledgee, the shares are placed on the books of the association in such way *as to imply that the pledgee is the real owner*, then the pledgee may be treated *as a shareholder* within the meaning of Section 5151 of the Revised Statutes of the United States, and, therefore, liable upon the basis prescribed by that section for the contracts, debts and engagements of the association," See p. 619.

The Pauly case, which was decided March 1, 1897, directly involved the question of a shareholder's liability under the statute, while the California Bank case, which was decided May 24, 1897, involved no such question. There is no real or apparent conflict between the two cases, and in the latter case the court did not comment upon or even refer to the former case.

Including the case at bar, three decisions have been rendered by United States Circuit Courts of Appeal on the liability of corporations as shareholders in the Indianapolis National Bank, and in every case the assessment has been sustained. In Citizen's State Bank of Noblesville *vs.* Hawkins, 71 Fed., 369, and Cooper Ins. Co. *vs.* Hawkins, *Id.*, 373, the liability was enforced upon the grounds that the corporations had the power under certain circumstances, and for certain purposes, to acquire stock in a national bank; that the shares had been purchased from a third party and transferred upon the books of the association; and that the acquisition being within the scope of the general powers of the corporations, it was not the case of the exercise of a power not in any event given, but an abuse of a general power, a wrongful exercise of conferred power, which the public authorities alone could deal with. In the case at bar it was contended in the court below that the liability sought to be enforced was merely contractual, and that if the original purchase was unauthorized the action could not be maintained. The court, however, said: "This does not correctly state the nature of the liability. There can be no substantial doubt that, whether the purchase of the stock was authorized or not, the plaintiff in error was, after its transfer, by the force of the transaction, its owner, and no one else could stand as such. Under these circumstances, the liability sought to be enforced here arises by force of the statute, and is not contractual. Keyser *v.* Hitz, 133 U. S., 138, 151." We think this view of the case was clearly correct. Un-

doubtedly it was the legal duty of the Comptroller of the currency to make an assessment upon *all the shares* of the Indianapolis National Bank in order to raise money for the payment of its debts. An assessment upon these one hundred shares could not be made against any one except the plaintiff in error, for no one else held or claimed them. They had been transferred to it and stood in its name as the absolute owner on the books of the other bank; they had not been, and could not be, extinguished; the whole amount of the capital stock—that is, all the shares of stock issued and outstanding, as shown by the books—constituted the basis of the security provided by the statute for the benefit of creditors, and all the holders of such shares are placed upon a footing of perfect equality by the express provisions of the law. Under such circumstances it seems impossible to escape the conclusion that the plaintiff in error is liable for the assessment sued on.

If national banks are encouraged to invest their capital or their surplus funds in the shares of other associations by such a construction of the statute as will enable them to enjoy all the benefits of shareholders without incurring any of their liabilities, not only will great injustice be done in many cases, but the policy of the law itself will be defeated. If, on the other hand, the statutory liability is enforced against all the registered holders of shares, without discrimination in favor of the banks, the temptation to make such unauthorized investments will not exist, additional security will be afforded to the creditors of insolvent associations, and the policy of the law will be supported and carried out.

An affirmance is respectfully asked.

J. G. CARLISLE,
For Defendant in Error.

J. W. KERN,
Of Counsel.

APPENDIX.

BEFORE COLT, PUTNAM AND WEBB, *JJ.*

OPINION OF THE COURT.

MARCH 5, 1897.

PUTNAM, *J.*—This case is based by the plaintiff in error on the proposition that it had no power under the law of its creation to acquire the stock of another national bank as an investment. It is not necessary for us to consider this proposition. It is settled that it had full power to loan on the stock as collateral, or to have taken it in settlement of a doubtful debt, and in either case, as incidental thereto, to cause the stock to be transferred into its own name absolutely if it deemed it for its interest so to do (*First National Bank of Charlotte* v. *National Exchange Bank of Baltimore*, 92 U. S., 122; *National Bank* v. *Case*, 99 U. S., 628). Therefore, on the face of the transaction, no illegality appeared, and nothing to advise, either the bank whose stock it acquired, or the existing or future creditors of that bank, or the Comptroller of the Currency, who was their *quasi* public representative, that the transaction was not within the scope of the unquestionable powers of the plaintiff in error.

Under these circumstances the entire trend of the law is that the plaintiff in error is estopped to deny its liability in this case (*Chubb* v. *Upton*, 95 U. S., 665; *Pullman* v. *Upton*, 96 U. S., 328, 330; *National Bank* v. *Case*, 99 U. S., 628; *Scovill* v. *Thayer*, 105 U. S., 143, 149; *Anderson* v. *Philadelphia Warehouse Company*, 111 U. S., 479, 483). There might arise some exceptional instances where, for special reasons, this estoppel would not apply; as where stock had been issued in excess of the authorized limit (*Scovill* v. *Thayer, ubi supra*), or where, in the cases represented by Section 5152 of the Revised Statutes, there are no interests capable of binding themselves either by contract or estoppel, or where

the substance of the transaction appears on its face, as in *Beal* v. *Essex Savings Bank*, decided by us and reported in 67 Fed. Rep, 816; although the latter class is not strictly exceptional. But none of those special elements are found here. We have no need to reconcile *Burgess* v. *Seligman*, 107 U. S., 20, which arose on a statute of Missouri, as the decisions referred to by us apply directly to national banks, and come down to a later date.

The plaintiff in error maintains that the liability sought to be enforced here is merely contractual, flowing out of the acquisition of the stock in question and continuous upon it; so that, therefore, if the original investment was unauthorized, the liability, being still *in fieri*, cannot be enforced. But this does not correctly state the nature of the liability. There can be no substantial doubt that, whether the purchase of the stock was authorized or not, the plaintiff in error was, after its transfer, by the force of the transaction, its owner, and that no one else could stand as such. Under these circumstances, the liability sought to be enforced here arises by force of the statute, and is not contractual (*Keyser* v. *Hitz*, 133 U. S., 138, 151).

Indeed the expressions of the Supreme Court found in *National Bank* v. *Case*, *ubi supra*, are so much in harmony with the rules deducible from its practical conclusions in the cases to which we have referred, that we accept them as disposing of this case. The Court said, at page 633:

"There is nothing in the argument on behalf of the appellant that the bank was not authorized to make a loan with the stock of another bank pledged as collateral security. That is an ordinary mode of loaning, and there is nothing in the letter or spirit of the National Banking Act that prohibits it. But if there were, the lender could not set up its own violation of law to escape the responsibility resulting from an illegal action."

The judgment of the Circuit Court is affirmed, with interest, and with the costs of this court to the defendant in error.

BEFORE COLT, PUTNAM AND WEBB, *JJ.*

OPINION OF THE COURT.

JULY 20, 1897.

PUTNAM, *J.*—The plaintiff in error has filed a petition for a rehearing, resting on California Bank *v.* Kennedy, 167 U. S., 362, which was decided a few days after our decision in this case. The issue considered by the Supreme Court was the liability of a national bank as a stockholder in a State savings bank, while the question before us was as to its liability as a stockholder in another national bank. The question discussed by the Supreme Court was more largely that of *ultra vires* than that of the policy of the statutes relating to national banking associations, and its line of decisions which we understood to bind us in the case at bar were not particularly noticed by it. Therefore, it does not follow beyond question that California Bank *v.* Kennedy is decisive of the case at bar.

Inasmuch as the defendant in error has undoubted means of relief by a writ of error, we, under the circumstances, are of the opinion that the petition should be denied.

Petition for rehearing denied; mandate to stay until further order.

CONCORD FIRST NATIONAL BANK *v.* HAWKINS.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 187. Argued and submitted January 20, 1899. — Decided May 15, 1899.

The investment by the First National Bank of Concord, New Hampshire, of a part of its surplus funds in the stock of the Indianapolis National Bank of Indianapolis, Indiana, was an act which it had no power or

Statement of the Case.

authority in law to do, and which is plainly against the meaning and policy of the statutes of the United States and cannot be countenanced; and the Concord corporation is not liable to the receiver of the Indianapolis corporation for an assessment upon the stock so purchased made under an order of the Comptroller of the Currency to enforce the individual liability of all stockholders to the extent of the assessment.

The doctrine of estoppel does not apply to this case.

In May, 1895, Edward Hawkins, as receiver of the Indianapolis National Bank, brought a suit, in the Circuit Court of the United States for the District of New Hampshire, against the First National Bank of Concord. At the trial a jury was waived, and the court found the following facts:

"The plaintiff is receiver of the Indianapolis National Bank of Indianapolis, which bank was duly organized and authorized to do business as a national banking association. The bank was declared insolvent and ceased to do business on the 24th day of July, 1893; the plaintiff was duly appointed and qualified receiver of the bank on the 3d day of August, 1893, and took possession of the assets of the bank on the 8th day of the same month.

"The capital stock of the bank was 3000 shares of the par value of $100 each. On the 25th day of October, 1893, an assessment was ordered by the Comptroller of $100 per share on the capital stock of the bank, to enforce the individual liability of stockholders, and an order made to pay such assessment on or before the 25th day of November, 1893; and the defendant was duly notified thereof.

"The defendant, being a national banking association, duly organized and authorized to do business at Concord, N. H., on the 21st day of May, 1889, with a portion of its surplus funds, purchased of a third party, authorized to hold and make sale, 100 shares of the stock of the Indianapolis National Bank as an investment, and has ever since held the same as an investment. The defendant bank has appeared upon the books of the Indianapolis bank as a shareholder of 100 shares of its stock, from the time of such purchase to the present time. During such holding the defendant bank received annual dividends declared by the Indianapolis bank

prior to July, 1893. The defendant has not paid said assessment or any part thereof."

After argument the court, on July 28, 1896, entered judgment in favor of the plaintiff for the sum of $11,646.67 and costs. From that judgment a writ of error from the United States Circuit Court of Appeals for the First Circuit was sued out, and by that court the judgment of the trial court was, on March 5, 1897, affirmed. 33 U. S. App. 747. From the judgment of the Circuit Court of Appeals a writ of error was allowed to this court.

Mr. Frank S. Streeter for the Concord National Bank submitted on his brief.

Mr. John G. Carlisle for Hawkins. *Mr. J. W. Kern* was on his brief.

Mr. Justice Shiras, after making the above statement, delivered the opinion of the court.

The questions presented for our consideration in this case are whether one national bank can lawfully acquire and hold the stock of another as an investment, and, if not, whether, in the case of such an actual purchase, the bank is estopped to deny its liability, as an apparent stockholder, for an assessment on such stock ordered by the Comptroller of the Currency.

By section 5136 of the Revised Statutes a national banking association is authorized "to exercise by its board of directors, or duly authorized officers and agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of indebtedness; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title."

In construing this provision, it was said by this court, in

First National Bank v. *National Exchange Bank*, 92 U. S. 122, 128, that "dealing in stocks is not expressly prohibited, but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks."

And in the recent case of *California Bank* v. *Kennedy*, 167 U. S. 362, it was said to be "settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established. . . . No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may, in the usual course of doing such business, accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. . . . So, also, a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power."

Accordingly it was held in that case that a provision of the laws of the State of California, which declared a liability on the part of stockholders to pay the debts of a savings bank, in proportion to the amount of stock held by each, could not be enforced against a national bank, in whose name stood shares of stock in a savings bank, it being admitted that the stock of the savings bank had not been taken as security, and that the transaction by which the stock was placed in the name of the national bank was one not in the course of the business of banking for which the bank was organized.

It is suggested by the learned Circuit Judge, in his opinion overruling a petition for a rehearing in the Circuit Court of Appeals, that the question considered in the case of *California Bank* v. *Kennedy* was the liability of a national bank as a stockholder in a state savings bank, while the question in the present case is as to its liability as a stockholder in another national bank, and that therefore it does not follow beyond question that the decision in the former case is decisive of the present one. 50 U. S. App. 178.

No reason is given by the learned judge in support of the solidity of such a distinction, and none occurs to us. Indeed, we think that the reasons which disqualify a national bank from investing its money in the stock of another corporation are quite as obvious when that other corporation is a national bank as in the case of other corporations. The investment by national banks of their surplus funds in other national banks, situated, perhaps, in distant States, as in the present case, is plainly against the meaning and policy of the statutes from which they derive their powers, and evil consequences would be certain to ensue if such a course of conduct were countenanced as lawful. Thus, it is enacted, in section 5146, that "every director must, during his whole term of service, be a citizen of the United States, and at least three fourths of the directors must have resided in the State, Territory or district in which the association is located for at least one year immediately preceding their election, and must be residents therein during their continuance in office."

One of the evident purposes of this enactment is to confine the management of each bank to persons who live in the neighborhood, and who may, for that reason, be supposed to know the trustworthiness of those who are to be appointed officers of the bank, and the character and financial ability of those who may seek to borrow its money. But if the funds of a bank in New Hampshire, instead of being retained in the custody and management of its directors, are invested in the stock of a bank in Indiana, the policy of this wholesome provision of the statute would be frustrated. The property of the local stockholders, so far as thus invested, would not be

managed by directors of their own selection, but by distant and unknown persons. Another evil that might result, if large and wealthy banks were permitted to buy and hold the capital stock of other banks, would be that, in that way, the banking capital of a community might be concentrated in one concern, and business men be deprived of the advantages that attend competition between banks. Such accumulation of capital would be in disregard of the policy of the national banking law, as seen in its numerous provisions regulating the amount of the capital stock and the methods to be pursued in increasing or reducing it. The smaller banks, in such a case, would be in fact, though not in form, branches of the larger one.

Section 5201 may also be referred to as indicating the policy of this legislation. It is in the following terms:

"No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association."

This provision, forbidding a national bank to own and hold shares of its own capital stock, would, in effect, be defeated if one national bank were permitted to own and hold a controlling interest in the capital stock of another.

Without pursuing this branch of the subject further, we are satisfied to express our conclusion, upon principle and authority, that the plaintiff in error, as a national banking association, had no power or authority to purchase with its surplus funds as an investment, and hold as such, shares of stock in the Indianapolis National Bank of Indianapolis.

The remaining question for our determination is whether the First National Bank of Concord, having, as a matter of fact, but without authority of law, purchased and held as an investment shares of stock in the Indianapolis National Bank,

can protect itself from a suit by the receiver of the latter brought to enforce the stockholders' liability, arising under an assessment by the Comptroller of the Currency, by alleging the unlawfulness of its own action.

This question has been so recently answered by decisions of this court that it will be sufficient, for our present purpose, to cite those decisions without undertaking to fortify the reasoning and conclusions therein reached.

In *Central Transportation Company* v. *Pullman's Car Co.*, 139 U. S. 24, after an examination of the authorities, the conclusion was thus stated by Mr. Justice Gray:

"It was argued in behalf of the plaintiff that, even if the contract sued on was void, because *ultra vires* and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defence to this action to recover the compensation agreed on for that period. But this argument, though sustained by decisions in some of the States, finds no support in the judgment of this court. . . . The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:

"A contract of a corporation which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not be authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

"When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped

to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

The principles thus asserted were directly applied in the case of *California Bank* v. *Kennedy*, 167 U. S. 362, 367, where the question and the answer were thus stated by Mr. Justice White:

"The transfer of the stock in question to the bank being unauthorized by law, does the fact that, under some circumstances, the bank might have legally acquired stock in the corporation, estop the bank from setting up the illegality of the transaction?

"Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the nullity of an act which is an *ultra vires* act. The cases . . . recognize as sound doctrine that the powers of corporations are such only as are conferred upon them by statute."

There is then quoted a passage from the decision of the court in *McCormick* v. *Market National Bank*, 165 U. S. 538, 549, as follows:

"The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

The conclusion reached was thus expressed:

"The claim that the bank, in consequence of the receipt

by it of dividends on the stock of the savings bank is estopped from questioning its ownership and consequent liability, is but a reiteration of the contention that the acquiring of stock by the bank, under the circumstances disclosed, was not void but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void, could not be confirmed or ratified."

In the present case it is sought to escape the force of these decisions by the contention that the liability of the stockholder in a national bank to respond to an assessment in case of insolvency is not contractual, but statutory.

Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation.

However, whether, in the case of persons *sui juris*, this liability is to be regarded as a contractual incident to the ownership of the stock, or as a statutory obligation, does not seem to present a practical question in the present case.

If the previous reasoning be sound, whereby the conclusion was reached that, by reason of the limitations and provisions of the national banking statutes, it is not competent for an association organized thereunder to take upon itself, for investment, ownership of such stock, no intention can be reasonably imputed to Congress to subject the stockholders and creditors thereof, for whose protection those limitations and provisions were designed, to the same liability by reason of a void act on the part of the officers of the bank, as would have resulted from a lawful act.

It is argued, on behalf of the receiver, that the object of the statute was to afford a speedy and effective remedy to the creditors of a failed bank, and that this object would be defeated in a great many cases if the Comptroller were obliged to inquire into the validity of all the contracts by

which the registered shareholders acquired their respective shares.

The force of this objection is not apparent. It is doubtless within the scope of the Comptroller's duty, when informed by the reports of the bank that such an investment has been made, to direct that it be at once disposed of, but the Comptroller's act in ordering an assessment, while conclusive as to the necessity for making it, involves no judgment by him as to the judicial rights of parties to be affected. While he, of course, assumes that there are stockholders to respond to his order, it is not his function to inquire or determine what, if any, stockholders are exempted.

The judgment of the Circuit Court of Appeals is reversed, the judgment of the Circuit Court is also reversed, and the cause is remanded to that court with directions to enter a judgment in conformity with this opinion.